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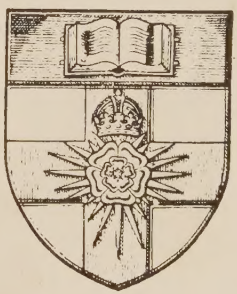

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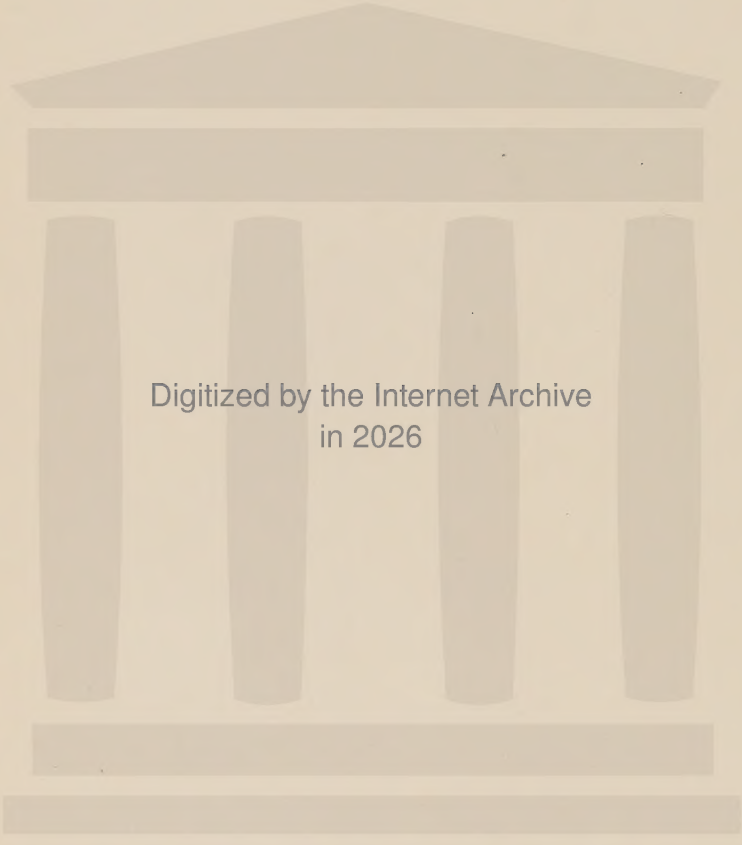
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THE

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

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MEMORANDA.

1898. *In the Vacation after Michaelmas Sittings,* 1898, The Honourable Sir Henry Hawkins *resigned his office as one of the Justices of Her Majesty's High Court of Justice. He was afterwards created a Baron of the United Kingdom by the title of* Baron Brampton of Brampton, *in the United Kingdom, and was sworn of the Privy Council.*

1899. *Jan.* 6. Thomas Townsend Bucknill, Esq., *one of Her Majesty's Counsel, was appointed one of the Justices of Her Majesty's High Court of Justice, and was afterwards Knighted.*

Feb. 15. The Right Honourable Sir Joseph William Chitty, *Lord Justice of Appeal, died at his residence in Queen's Gate Gardens, Kensington, after a short illness, at the age of* 70.

Feb. 27. The Honourable Sir Robert Romer, *one of the Justices of Her Majesty's High Court of Justice, was appointed a Lord Justice of Appeal, and was afterwards sworn of the Privy Council.*

—— Herbert Hardy Cozens-Hardy, Esq., *one of Her Majesty's Counsel, was appointed one of the Justices of Her Majesty's High Court of Justice, and was afterwards Knighted.*

March 1. The Right Honourable Lord Herschell *died suddenly at Washington, in the United States of America, at the age of* 61.

April. Sir Arthur Charles, *formerly one of the Justices of Her Majesty's High Court of Justice, was appointed Judge of the Court of Arches in the place of* The Right Honourable Lord Penzance, *resigned.*

May 24. The Right Honourable Viscount Esher, *died at his residence Ennismore Gardens, Prince's Gate, at the age of* 83.

Sept. 14. The Right Honourable Lord Watson, *one of the Lords of Appeal in Ordinary, died at Kelso, N.B., after a long illness, at the age of* 71.

Oct. 28. GEORGE FARWELL, ESQ., *one of Her Majesty's Counsel, was appointed an additional Judge of Her Majesty's High Court of Justice, in pursuance of s.* 18 *of The Appellate Jurisdiction Act,* 1876, *and was afterwards Knighted.*

Nov. 13. THE RIGHT HONOURABLE JAMES FREDERICK BANNERMAN ROBERTSON, *Lord Justice General and President of the Court of Session in Scotland, was appointed a Lord of Appeal in Ordinary under the Appellate Jurisdiction Act,* 1876, *and was created a Baron for life by the title of* BARON ROBERTSON OF PORTEVIOT, *in the County of Perth.*

Dec. 9. THE RIGHT HONOURABLE LORD PENZANCE *died at his residence, Godalming, Surrey, at the age of* 83.

ERRATA.

Page	*Line*	*For*	*Read*
155	foot-note (3)	[1897] 1 Q. B. 679	[1897] 1 Q. B. 579.
183	line 22	Archibald J.	Keating J.
323	foot-note (1)	10 Ves. 321.	10 Ves. 522.
324	„ (3)		
627	4 & 5	transpose words "allowed" and "overruled."	

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

HOPE AND OTHERS . . . . . APPELLANTS; H. L. (Sc.) 1898 July 28.

AND

CAMPBELL AND OTHERS . . . . . RESPONDENTS.

Will—Relevancy—Capacity—Insane Delusions.

In an action for reduction of a will the pursuers averred that the testator was "subject to insane delusions," and that "he believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communications on various occasions." That these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will:—

Held, reversing the decision of the First Division of the Court of Session (Lord Davey dissenting), that a relevant case for trial was averred.

APPEAL against certain interlocutors pronounced by the Lord Ordinary and the First Division of the Court of Session, Scotland (1), in an action at the instance of the appellants,

(1) (1896) 23 R. 513.

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Hope and others, who represent the heir-at-law and whole next of kin of the late Mr. John Hope, writer to the Signet, against the respondents, Campbell and others, who were the late Mr. Hope's trustees and executors. The appellants sought to reduce and have set aside trust deeds by which Mr. Hope directed his estate to be applied in advancing the cause of total abstinence and in disseminating a knowledge of the anti-scriptural character of the practices of the Church of Rome.

Mr. Hope died on June 25, 1893, aged eighty-six. He was possessed of very large estates, both heritable and movable. He was survived by a brother and sister and several nephews and nieces. By a trust disposition and settlement dated August 2, 1879, Mr. Hope conveyed his whole estate to trustees for certain purposes, directing them to apply the capital of the residue (1.) for the advancement of total abstinence, (2.) in opposing popery, (3.) in disseminating a knowledge of the evidence of Christianity, and (4.) in promoting church establishment and constitutional government. By an inter vivos trust conveyance dated April 22, 1890, Mr. Hope conveyed to himself and certain other persons lands of the value of over 84,000*l.*, and directed that the capital should be administered as a permanent trust for the following purposes:—

"(*Second*), In expending not less than the sum of 1000*l.* sterling, and not more than the sum of 1500*l.* sterling, per annum, in the carrying on and advancing the cause of total abstinence, at home or abroad, from the giving or partaking of any beer, porter, ale, wine, or cordials containing alcohol, or any whisky, brandy, rum, gin, or other spirits, or any spirituous or fermented or alcoholic liquors, or tobacco, or opium, as articles of diet, or luxury, or beverage, in any form and degree, and from the use of alcoholic or fermented wine or other intoxicating liquors in the celebration of the Lord's Supper, and in promoting, in the celebration of the Lord's Supper, the use of the juice of the grape unfermented, being the fruit of the vine commonly called unfermented wine," and, "(*Third*), In expending the remainder of the said income and annual proceeds . . . . in the following objects, *videlicet*, in disseminating among the people of Edinburgh and elsewhere in the

United Kingdom or abroad a knowledge of the anti-scriptural nature and character of the doctrines and practices of the Church of Rome, otherwise called the Roman Catholic Church, and in arousing the people of Scotland, England, or Ireland, or of the whole United Kingdom, or of other lands, to a sense of the dangerous, pernicious, and evil influences and operations of the Church of Rome upon the people's civil and religious liberties, and in originating and promoting efforts and operations, whether religious or social or political or otherwise, for the conversion of Roman Catholics to Protestantism and to Christ, and the hastening the overthrow of the Church of Rome, and in exposing and opposing all attempts to introduce a liturgy, or prelacy, or sacerdotalism, or ritualism, in any form or degree, into or among any of the Presbyterian Churches of Scotland, and these by means of the following works and operations and enterprises and others, all and every one of which, when entered upon, I hereby provide and declare shall be carried out and effected in accordance with the evangelical Calvinistic principles of the Protestant religion as at present embodied and set forth in the standards of the Church of Scotland," by various means which were set out in the deed.

By a trust disposition and settlement dated July 26, 1890, Mr. Hope, on the narrative of the deed of trust of April 22, 1890, brought under its operation the remainder of his estate, and conveyed the whole residue of the estate, heritable and movable, belonging to him at the date of his death, to his trustees, to be administered by them for the purposes set out in the deed of April 22, 1890, subject to certain directions with reference to particular portions of his estate.

By various codicils certain legacies were bequeathed on condition that the legatees were and continued to be total abstainers from alcohol, tobacco, opium, and snuff, that they did not frequent taverns, theatres, balls, and circuses, and that they continued to attend Divine service in the Church of Scotland.

The appellants' material averment was as follows:—"The said John Hope was in many respects a man of very eccentric habits, both of mind and body. For many years of his life he was subject to hallucinations, especially in regard to matters

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connected with temperance and total abstinence and with the Church of Rome. His speech, writings, and actions in regard to these topics were unreasonable and extravagant, and his mind in relation to the said subjects was disordered and unhinged. Upon both the said topics he was subject to [insane] delusions. [He believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communication upon various occasions. These insane delusions dominated his mind and overmastered his judgment] to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will. The pursuers believe and aver that at the dates of the said deeds and codicils, reduction of which is sought by the leading conclusion of the summons, the said John Hope was not of sound disposing mind. The said deeds and codicils are not the deeds of the said John Hope. Mr. John Hope therefore died intestate, and the pursuers, as his next of kin and heir-at-law, are entitled to his whole succession, heritable and movable, according to their respective rights and interests in the same."

The words within brackets were added on amendment by the appellants when the case was before the First Division on December 5, 1895.

On June 18, 1895, the Lord Ordinary (Lord Kincairney), held that the appellants' averments were insufficient to support the conclusions of the summons, and dismissed the action with costs. This judgment was affirmed by the First Division of the Court of Session on February 19, 1896.

July 26. *A. Graham Murray, L.A.*, and *Ure, Q.C.* (with them *J. D. Sym*), all of the Scottish Bar, for the appellants. The Court of Session was wrong in refusing to allow the case to be tried. The views of the testator with regard to anti-Popery and total abstinence were worked into every idea of his mind. He was subject to insane hallucinations and delusions

directly connected with these subjects, regarding which he conceived he had received commands from the Deity by direct communication upon various occasions. In such a case it is for a jury to say whether the insane delusions affected the testator's will itself. The appellants now distinctly aver that the testator was at the time he made his will suffering from insane delusions, and a proof of the appellants' allegations ought to have been allowed : *Morrison* v. *Maclean's Trustees* (1) ; *Nisbet's Trustees* v. *Nisbet.* (2)

Scott Dickson, S.-G. for Scotland, and *Guthrie, Q.C.* (with them *Danckwerts* and *John Wilson*), (all of the Scottish Bar except the third), appeared for the respondents. The appellants have not set forth any averment as capable of proof by which they can constitute any reasonable cause for reduction. The appellants' case, on their own admissions, was that the testator had delusions on certain special subjects, and the alleged insane delusions were not specified until the amendment allowed by the Inner House. Further, the admissions made by the appellants, that Mr. Hope was actively engaged up to his death in carrying on a very large business as a writer to the Signet, were irreconcilable with the appellants' contentions. There was nothing unreasonable in Mr. Hope's belief that he had a special duty to promote the two great causes with which he had been so identified during a long life. These were beliefs which rational men held. Nor did it become an insane belief because he founded the duty on the receipt by him of Divine commands. There was no case where the Court was satisfied with a bare averment that the testator was suffering from insane delusions : *Moodie* v. *Stewart* (3) and *Clydesdale Bank* v. *Paton.* (4)

LORD WATSON. Whether the averments made by the pursuers in support of their action would, if proved or admitted, be sufficient to entitle them to decree, is the only question raised in this appeal.

The action is brought by the heir-at-law and next of kin of a gentleman deceased for the purpose of setting aside three

(1) (1862) 24 D. 625.
(2) (1871) 9 M. 937.
(3) (1730) 1 Pat. App. 20.
(4) [1896] A. C. 381.

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deeds, one of them inter vivos, and the others testamentary, by which he conveyed the bulk of his large estate heritable and movable to trustees, to be held by them for the promotion of certain charitable or benevolent objects. Shortly stated, these objects were total abstinence from the use of alcoholic or fermented liquors, or of tobacco or opium, the dissemination of the true doctrines of the Protestant religion, the inculcation of the danger arising to civil and religious liberty from the doctrines of the Church of Rome, the promotion of Sabbath observance, of Church and State connection, and of the union of all Christian Churches on the basis of a united established Church.

One main peculiarity of the case presented by the pursuers in their condescendence, and in their answers to the separate statement of facts for the defenders, consists in this—that, whilst alleging that the deceased was eccentric, they do not dispute that during his life, which was prolonged until the age of eighty-six, he carried on a successful business as a writer to the Signet, took for many years an active part in municipal affairs, and for forty years before his death freely spent both his time and his money in promoting those objects to which he has directed that his estate shall be applied.

The material averments relating to the alleged incapacity of the deceased to execute the deeds under challenge are to be found in the eighth article of the condescendence. With reference to "matters connected with temperance and total abstinence and with the Church of Rome," it is there stated that "upon both the said topics he" (that is, the testator) "was subject to insane delusions. He believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he had received from the Deity by direct communication upon various occasions. These insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will."

I do not think that any lawyer would dispute the proposition

that a testamentary disposition cannot receive effect if it be shewn that its provisions were prompted by an insane delusion or delusions existing in the mind of the testator. In my opinion the late very able and learned head of the Court of Session (Lord Inglis) stated the law with perfect accuracy in the case of *Morrison* v. *Maclean's Trustees* (1), where he directed the jury thus: "Sometimes a writing of this kind" (referring to a testament), "although expressed in perfectly intelligible language, although it may express apparently a rational and even laudable purpose, and although the writer may understand its legal consequences and effects, may still be the production of insanity, and may appear upon its very face to be so. Supposing that he were to set out upon the face of this testament that he does make this disposition of his property because he believes something to be the case which no sane man could believe; suppose he were to tell you that he makes this disposition of his property because he has received a direct revelation from Heaven, that it is his duty to do it, it would be quite a different case. Then upon the face of the deed itself there would be enough to condemn it. But certainly, in so far as this writing is concerned, there is no delusion apparent in the deed and the man who wrote it, it being his own act, unaided by anybody else, so far as I can see, must be held to have been mentally capable of conceiving the purpose, of expressing it in distinct language, and of foreseeing and understanding its legal consequences and effects. But, gentlemen, still further, although the deed itself may be of this character, and may prove his mental capacity so far, and may not disclose any insane belief or delusion as the spring of his action or the motive of his conduct, such may nevertheless exist; and if the pursuer has proved to your satisfaction that the testator was suffering under delusions which led him to execute this deed to the detriment of his own relatives, and so to cut off his natural succession, he may still prevail; because a man may be labouring under the most insane delusion, and yet have mental capacity to do what shall upon the face of it appear to be a perfectly sane thing, actuated thereto by the insane delusion."

(1) 24 D. 633.

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The words which I have already quoted from art. 8 of the condescendence appear to me to contain a substantial averment that the deceased believed that he had on various occasions received a direct command from Heaven to devote his means to the furtherance of total abstinence and exposing the errors of the Church of Rome. I think that is the true meaning of the words used, according to their primary and natural significance, and that they cannot, without resorting to a strained and figurative construction, be read as merely conveying the allegation that the deceased believed that, according to the dictates of his conscience, it was his duty to devote his means to these objects. Had the averments amounted to no more than that which I have last expressed, they would not in my opinion have been relevant. I do not think, and I protest against the assumption, that, in Scottish cases of relevancy the extremely technical rules of construction which were sometimes applied by the Law Courts of England in cases on demurrer ought to be followed. I concede that in cases where there is an alternative averment of fact, relevancy must depend upon the weaker alternative—the only one which the pursuer absolutely offers to prove; but in my opinion, averments which are not alternative are sufficient for relevancy if, according to their primary meaning, they are sufficient to support the conclusions of the action. In that view I think the averments of art. 8 are sufficient to entitle the pursuers to inquiry, and it is not inconsistent with that opinion that Lord President Inglis employed substantially the same language for the purpose of explaining to a jury what was sufficient to constitute an insane delusion.

In this case it appears to me that a substantial issue is raised by the appellants' averment that the motives of the testator were due to insane delusions. The answer to be given to that issue, whether affirmative or negative, will depend upon the inference to be derived from a consideration of the evidence. I do not think that the appellants' right to lead evidence is necessarily excluded by the circumstance that such inference may possibly be negative.

[His Lordship then moved the order of reversal given at the end of this report.]

LORD SHAND. I do not think that this case can be represented as being free from difficulty; but, after consideration, I remain of the opinion which I held at the close of the discussion —that the pursuers have made a relevant statement which entitles them to have inquiry.

When the case was before the Lord Ordinary, Lord Kincairney, I think his Lordship had no alternative but to dismiss it. I agree with his Lordship in thinking that the case as presented to him was not relevant; and I entirely adopt what I venture to call the admirable judgment which his Lordship delivered. The record, as it then stood in art. 8, which really gives the statement on which the relevancy must be tested, contained only an averment that "for many years of his life" Mr. Hope, the testator, had been "subject to hallucinations"; that "his speech, his writings, and actions" "were unreasonable and extravagant, and that his mind, in relation to" the subjects which are there mentioned, "was disordered and unhinged." The statement went on to say "that upon both the said topics he was subject to delusions" "to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will." The article, no doubt, went on to say that the "deeds and codicils were not the deeds of the said John Hope." But from the beginning to the end of the whole statement there was no averment of insanity, and while in a sense a statement may be regarded as relevant which alleges that the deeds are not the deeds of the testator, inplying (it may be) insanity, I agree in thinking that such a bald averment only is quite insufficient. It may be said to be sufficient because in stating that the deed is not the deed of the testator it is thereby meant that the testator had not the capacity to execute it; but it would not be relevant in the sense in which a pursuer is bound to state his case, in respect of specification.

I think the record failed in two points: first, because there was no averment of insanity; and, secondly, because there was not a statement or even a hint given to the defenders who were to support the will of the grounds upon which it was to be

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maintained that insanity existed. Lord Kincairney has very fully explained his view upon that subject, and, as I have said, I agree with him.

When the case went to review before the First Division of the Court of Session, the record, after discussion, was altered and amended. It was altered and amended in two particulars, to some extent following the suggestions which Lord Kincairney had made. In the first place, the delusions were no longer left simply as delusions, but they were characterised as "insane delusions," and in addition to that these words were added—that the testator "believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communication upon various occasions. These insane delusions dominated his mind and overmastered his judgment to such an extent as to make him incapable of" "taking a rational view of the matters to be considered in making a will." The amendment, therefore, added the averment of insanity, and it gave the particulars, as it appears to me, of what that insanity consisted in. I confess, my Lords, that I have difficulty in understanding the view which was stated by the First Division of the Court in the passage of the opinion of the learned Lord President, in which he says,—"The amendment of the record seems to me, therefore, to weaken and not to strengthen it." How the record could be weakened by adding an averment of insanity I have difficulty in understanding, or how it could be weakened by adding, in addition to the averment of insanity, the particular point or ground upon which it was said that the testator's mind was unhinged and unsound.

His Lordship goes on to say that the averment "amounted to no more than this: that Mr. Hope believed that in promoting the two objects in question he was obeying God's will as made manifest by God to his conscience." If I read the record as their Lordships in the First Division have done, as so explained, I should agree with them in the result at which they arrived; but I cannot read this record which avers

insanity, and which avers, as I read it, that there was a direct communication from the Deity prescribing the making of this will—prescribing the way in which this testator was to give his means in promoting teetotalism and in efforts to destroy the Roman Catholic religion. I say I cannot read that as an averment the proof of which should not be allowed in order to test whether this was or was not a deed of the testator.

I do not doubt that, in construing a record, there must be a certain measure of strictness applied, as my noble and learned friend on the Woolsack has now said. If, for example, you have two alternatives stated as the ground of action, one of which would form a good ground of action and the other of which would not, you must test the record by taking the weaker alternative, and in that case I should hold the averment not relevant. On the other hand, I think, as my noble and learned friend has said, that you must take the words as you find them in the record according to their fair ordinary and primary meaning, and not according to any figurative meaning. If the language here be so taken, I find myself quite unable to reach the result I have read from the opinion of the Lord President—that there is nothing more here alleged than that the testator was obeying God's will as made manifest by God to his conscience.

My Lords, if the averment which is here made, and which I have now read, were admitted by the defenders to be true, I can scarcely suppose that it could be contended that the deeds sought to be set aside should nevertheless stand. I do not say that the test of a defender admitting what is stated on the record is necessarily conclusive as to relevancy. If the whole averment here had been that the testator was insane, an admission of that no doubt would have destroyed the deed; but I think the defenders in such a case would be entitled to say, "The averment is not relevant, not because in a sense you have not stated that which would set aside the deed, but because we, the defenders, are entitled to specification or particulars." In this case, I think if you take the averment of insanity followed by the particulars which are given, which I understand to mean what my noble and learned friend has already said, then I

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cannot doubt that this is relevant. I do not think that the statement here is merely that the testator was acting according to the dictates of his conscience, but I think it amounts to this: that there was a special communication to him from the Deity directly bearing upon his duty in making this bequest, and that the bequest and the purposes of the bequest were the result of that special communication.

There are two matters which appear to have weighed with the Court in their judgment upon which I must say a word. I see that the Lord President says: "Taking the record of the pursuers as a whole, including the admissions, the general statement of unsoundness of mind is to be read as relative to the will which it is said to invalidate"; and I rather think that the considerations which I see are stated in the respondents' case at p. 9 pressed considerably on the minds of the judges in dealing with this case on the question of relevancy. I see it is there stated, "It is submitted that the deeds themselves demonstrate that the truster was a man with many interests, and that" . . . . "he had resolved to concentrate his efforts and devote his means chiefly" to two objects which he had promoted. "In the next place," it goes on to say, "It is submitted that the admissions made by the appellants are altogether irreconcilable with their main contention in respect they concede among other points the following." Then what is mainly founded on is that the testator had been actively engaged in business as a writer to the Signet, that he was an Edinburgh town councillor, and had fulfilled a number of public duties. My Lords, it seems to me with deference that these are considerations proper to the next stage of this case, and not to the question of relevancy. Both parties, I observe, seem to indicate that the deeds in themselves favour their case. The pursuers say that any one reading these deeds would infer from them that they were the deeds of a man not only of great peculiarities, but of such peculiarities as would favour the view that there was insanity in his case. The defenders, on the other hand, say on the contrary, that these deeds are such as many people would very highly approve of. Again, it is said that the testator was a man of business, and took an interest, not only in professional

matters, but in matters of general interest. I can very well see and believe that that circumstance must create certain difficulties in the way of the pursuers, and I can appreciate that these difficulties may have much weight in the ultimate decision of the case. But, my Lords, on the question of relevancy it humbly appears to me that they are out of place. However good a man of business the testator may have been, however well he may have understood his professional affairs, however much he may have been interested in public matters, he may have been acting under delusions such as the late learned Lord President referred to in the case of *Morrison* v. *Maclean's Trustees*. (1) If so, I agree with the view that the Lord President there stated, that the deed would fail because of the insanity of the testator.

On these grounds I am of opinion with my noble and learned friend on the Woolsack that the interlocutors should be reversed, and that the case should be sent back to the Court of Session for inquiry.

LORD DAVEY. My Lords, I feel some diffidence in disagreeing from your Lordships, who have had so great experience in questions of this kind arising in Scotland. But I do not see my way to differ from the Court of Session in this case.

I do not differ from my noble and learned friends as to the principles which should be applied on questions of relevancy of averment in Scottish pleading, and I think it would be unfortunate if the technical rules formerly applied to demurrers in the English Courts were introduced into Scottish procedure. But the question which I put to myself is whether, if these sentences which your Lordship has read from the condescendence were proved, they would necessarily amount to a finding of insanity and support the action. I answer, they might or they might not. They do not aver the belief in revelations visual or audible, or in any material mode of communication of the Divine will. They are quite susceptible of the meaning—and, in my opinion, it is the more natural meaning—that the testator conceived that in the philanthropic and religious ends which

(1) 24 D. 633.

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he aimed at in his lifetime, and in the disposal of his property, he was prompted by the direct command of the Almighty working upon his conscience. I think that the words "insane delusions" must be interpreted by the sentence which follows, and not that sentence by the word "insane." Or (in other words) the words may mean—and I repeat that I think it is the more probable meaning—that he believed that the Divine Spirit spoke to him through his conscience, and his action was directed by what he conceived to be the command of the Almighty so conveyed. You may call this an insane delusion if you will; but it is a delusion (if it be one) which has been shared by some of the greatest benefactors of the human race, who in obedience to such a call or command (as they have believed) have devoted their lives to mitigating the misery of the world and endeavouring to raise mankind to a higher life and a better conception of their duties on earth.

I assume that the words which have been introduced by amendment are the utmost which the pursuers can aver with any hope of being able to prove them at the trial, and I am unable to read the words as necessarily amounting to, or therefore a relevant averment of, insanity.

Ordered, that the interlocutors appealed from be reversed; that the cause be remitted to the Court of Session to proceed further therein; that the appellants have their costs of this appeal; and that the expenses of process hitherto incurred in the Court of Session do abide the issue of the cause.

Lords' Journals, July 28, 1898.

Agents for appellants: *Loch & Co., for Dundas & Wilson, C.S., Edinburgh.*

Agents for respondents: *R. S. Taylor, Son & Humbert, for Macpherson & Mackay, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

HICKLING AND OTHERS . . . . . APPELLANTS; H. L. (Sc.)
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FAIR AND OTHERS . . . . . RESPONDENTS. *Aug.* 1.

Will—Succession—Vesting—Issue.

A testator bequeathed to his three daughters, in equal shares, the life-rent of a sum of 36,000*l.*, to be invested within five years after his decease. Until the investment was made, he bequeathed to each daughter an annuity of 200*l.* In the event of a daughter dying, without leaving issue, her life-rent interest was to accresce to her surviving sister or sisters, whilst the capital of the share life-rented by her lapsed into residue. In the event of her leaving issue, the trustees were directed "to divide equally amongst the issue of each of my said daughters" one-third of the sum directed to be invested. Mrs. M., one of the daughters, died in March, 1895, leaving surviving two daughters. Mrs. M. had had also a son and a daughter, Mrs. H., who predeceased her childless, but died after the testator. The question was whether the representatives of the predeceasing issue were entitled to a share of the capital appointed to be divided amongst Mrs. M.'s issue:—

Held, reversing the decision of the Second Division (Lords Watson and Herschell dissenting), that all the children of Mrs. M. were entitled to share equally in the division of the fund in which their mother had a life interest.

APPEAL from an interlocutor of the Second Division of the Court of Session dated March 12, 1896, in a special case presented for the judgment of the said Court. (1)

The facts and material parts of the deeds set forth in the special case were given as follows by Lord Watson:—

"By his trust disposition and settlement, dated September 5. 1862, the late Thomas Fair, whose family at that time consisted of four sons and three married daughters, directed his trustees to convey certain heritable subjects to his sons, whom he also appointed to take the residue of the trust estate. By the fifth purpose of the trust he directed his trustees, within five years from the time of his death, to invest 30,000*l.* upon good security, and to pay the interest or annual profits thereof,

(1) 23 R. 598.

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equally, to each of his daughters, Margaret Fair or Spence, Harriot Fair or Macaulay, and Mary Jane Fair or Thomas, during their respective lives. An annuity of 200*l.* was directed to be paid to each of these beneficiaries from the time of the testator's death until the investment of the 30,000*l.*

"With regard to the capital sum to be life-rented by his daughters, the testator by the fifth purpose of his trust deed directed as follows: 'On the death of my said daughters respectively, leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of ten thousand pounds sterling, being one-third of the sum directed to be invested as aforesaid, and should any of my said daughters die before the succession to the foresaid provision opens up to them, without leaving lawful issue, the share of the interest or annual profits of the said sum of thirty thousand pounds sterling directed to be invested as aforesaid to which my daughter so dying would have been entitled had she survived, shall be divided equally, share and share alike, between my surviving daughters, or paid to the last surviving daughter, during all the days of their lives or of her life allenarly, and the share of the said capital sum of thirty thousand pounds sterling, which would have fallen to be divided amongst the issue (if any) of my daughter so dying, shall be divided equally between the issue of my surviving daughters, or should there be only one surviving daughter having issue, to be paid equally to such issue.'

"By a codicil dated March 1, 1865, the testator directed his trustees, instead of 30,000*l.*, to invest the sum of 36,000*l.*, and to pay the interest and annual profits thereof equally to each of his three daughters, and that in the manner specified in his trust disposition and settlement 'the said fifth purpose of the said last disposition and settlement in all other respects remaining the same as therein specified, excepting always that the sum to be divided equally amongst the issue of each of my said daughters shall be twelve thousand pounds sterling instead of ten thousand pounds sterling.'

"The trust disposition and settlement contains no express directions with respect to the disposal of the fee of the share

life-rented by each daughter, in the event of her decease without leaving issue, after her succession to the life-rent. In that event, accordingly, the capital of her share falls into residue.

"The testator died in the year 1865. He was survived by all of his three daughters, who were alive at the time when the said sum of 36,000*l.* was duly invested by the trustees, and continued thereafter to receive payment of their respective shares of the interest and annual profits in terms of the testator's directions.

"Mary Jane Fair or Thomas, whose husband predeceased her, died without issue on July 2, 1874; and the capital of 12,000*l.*, which she had life-rented, fell into residue. By a formal deed of discharge and renunciation executed in April and registered on May 4, 1885, the residuary legatees renounced their interest in that sum, and directed that 6000*l.*, being a half of it, should be enjoyed in life-rent and fee respectively by each of the two surviving daughters and their issue; so that the shares of the provision of 36,000*l.* belonging to Mrs. Spence and Mrs. Macaulay in life-rent, and to their respective issue in fee, should each be 18,000*l.*; and that the said shares should be held and applied by the trustees upon the conditions expressed in the fifth purpose of the trust disposition and settlement.

"Harriot Fair or Macaulay died on February 16, 1895, and her husband on March 22 in the same year. The present controversy relates to the interest, if any, which the representatives of her predeceasing issue had or took in the said capital sum of 18,000*l.* at the time of her death. Four children were born of her marriage, these being Harriot Fair Macaulay or Garland, Mary Anne Fair Macaulay or Hickling, Thomas Fair Macaulay, and Margaret Fair Macaulay or Kinmont. Two of these children predeceased their mother. Thomas Fair Macaulay survived the testator, but died before his maternal aunt Mrs. Thomas, a minor, unmarried and intestate, his legal representatives in mobilibus being his surviving sisters and his father. Mrs. Hickling died in October, 1893, without having had issue.

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"Mrs. Garland and Mrs. Kinmont, the only children who survived their mother, Mrs. Macaulay, claim to be entitled each to one-half of the capital of 18,000*l.* life-rented by her. That they both have right to a share of the fund is admitted, but the amount of their claim has been disputed by the marriage contract trustees of Mrs. Hickling, and by the executors of Mr. Macaulay, her father, who maintain that, under the terms of the fifth purpose of the trust, Mrs. Hickling and her brother Thomas Fair Macaulay, as issue of Mrs. Macaulay who survived the testator, although predeceasing their mother, had a right to an equal share with the children who survived her.

"The various parties claiming an interest with the trustees under the trust disposition and settlement of Thomas Fair presented a special case to the Second Division of the Court, which narrates the facts already stated, and submits these questions for decision:—

"'(1.) Had the said Mrs. Hickling, at the date of her death, a vested interest in any part of the sum of 18,000*l.* life-rented by her mother, Mrs. Macaulay?

"'(2.) If so, was her interest limited to one-fourth of the sum of 12,000*l.* originally life-rented by Mrs. Macaulay?

"'or,

"'(3.) Did it extend to a share of the sum of 6000*l.*, set free by the death of Mrs. Thomas, which was life-rented by Mrs. Macaulay, and is dealt with by the deed of renunciation and direction?

"'(4.) Had the said Thomas Fair Macaulay, at the date of his death, a vested interest in any part of the said sum of 18,000*l.*?'

"On March 12, 1896, the Court, consisting of the Lord Justice Clerk, with Lords Young and Trayner, by the interlocutor appealed from, answered the first and fourth queries in the negative, and found it unnecessary to answer the second and third. In the argument at your Lordships' bar, it was assumed that no distinction could be made between the original 12,000*l.* and the 6000*l.* which was added to it by the deed of renunciation. I see no reason to doubt the correctness of the assumption; because the destination to these portions of the fund depends

upon the construction of the same words of the trust settlement which are applicable to both.' "

1897. July 9, 13. *Haldane, Q.C.* (with him *Gregory*), for the appellants. The question is, Did the gift in fee include Mrs. Macaulay's children who died before their mother, the life tenant, but survived the testator? The appellants represent the interest of Mary Anne Fair Hickling, a predeceasing child of Mrs. Macaulay, and claim one-fourth of Mrs. Macaulay's fund on the ground that, there being surviving issue of Mrs. Macaulay, all her children who survived the testator or their representatives took a share, whether such children survived Mrs. Macaulay or not. The gift vested a morte testatoris. There was no doubt that the gift to the issue of Mrs. Macaulay was contingent on some of her issue surviving her; but, having regard to the terms of the testator's will, that contingency is not imported into the description of the class of issue who are to take; and the postponement of the period of division did not postpone vesting. As to the share of Thomas, Mrs. Macaulay's son who predeceased her intestate and unmarried, Mrs. Hickling being one of his next of kin, the appellants' claim extends to his share also.

Further, it is clear that the fifth condition of the will was not intended to be cut down by the codicil, the words of the codicil being mere words of reference. [He commented upon *Taylor* v. *Graham* (1), *Hood* v. *Murray* (2), *Hope* v. *Potter* (3), *Hay's Trustees* v. *Hay* (4), *Boulton* v. *Beard* (5), *Bell* v. *Cheape* (6); *Steel's Trustees* v. *Steel* (7), and *In re Cresswell, Parkin* v. *Cresswell.* (8)]

Balfour, Q.C., and *Salvesen* (both of the Scottish Bar), for the respondents. The respondents represent the interests of Mrs. Garland and Mrs. Kinmont, the surviving daughters of Mrs. Macaulay, and claim the whole of Mrs. Macaulay's fund, the gift to the issue of Mrs. Macaulay taking effect in favour of such only of her children who survived her. The

(1) (1878) 3 App. Cas. 1287.
(2) (1889) 14 App. Cas. 124.
(3) (1857) 3 K. & J. 208.
(4) (1890) 17 R. 961.
(5) (1853) 3 D. M. & G. 608.
(6) (1845) 7 D. 614.
(7) (1888) 16 R. 204.
(8) (1883) 24 Ch. D. 102.

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gift is in the form of a direction to divide. It is not at first a gift and then division. The words of the testator are, "On the death of my said daughters respectively, leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters." That is, that the division is to take place, on the death of the life tenant, amongst the issue whom she has left. It was a condition of Mrs. Macaulay's children taking a vested interest that such children should survive her. That condition distinguishes the case from all those where there was a mere postponement of payment, as there is no gift here unless there are surviving issue. That was an event which might never happen, and, therefore, vesting was postponed until division.

All that is done by the codicil is to add 6000*l.* to the fund.

[They examined, as well as the above, the following cases: *Macdonald* v. *Scott* (1), *Home's Trustees* v. *Ramsays* (2), *Selby* v. *Whittaker* (3), *Slattery* v. *Ball* (4), *Adams' Trustees* v. *Carrick*. (5)]

Gregory, in reply.

J. St. F. Fair appeared for the testator's trustees.

The House took time for consideration.

1898. Aug. 1. LORD WATSON, after stating the facts as above, continued:—

The answer to be given to the first and fourth questions depends upon the construction which ought to be put upon these words occurring in the fifth purpose of the trust: "On the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of ten thousand pounds sterling." These words do not admit of the application of the maxim or rule of Scottish law, "Si sine liberis decesserit." That rule obtains in the case where a general settlement is made by a parent containing provisions in favour

(1) [1893] A. C. 651.
(2) (1884) 12 R. 314.
(3) (1877) 6 Ch. D. 239.
(4) (1887–8) 36 Ch. D. 508; 40 Ch. D. 11.
(5) (1896) 23 R. 828.

of children or other descendants, or by a person who stands in loco parentis to the beneficiaries therein designated. Its effect is to introduce into the provisions of the settlement, by implication of law, a conditional institution of the issue of a nominatim legatee who may die before the period of vesting. It is an implied gift over, on the failure of the parent to take, which will defeat an ulterior and express gift. In the present case the only gift to each daughter of the testator is one of life-rent, which dies with them; there is no gift of fee which their children could take by implied institution. The gift is not to the children of each daughter, but to her "issue"—a term which might bring in lineal descendants however remote. It is not necessary for the purposes of this case to consider whether, if a daughter had issue of several degrees of propinquity, such issue would take per capita or per stirpes, seeing that Mrs. Hickling and Thomas Fair Macaulay, whose rights alone are in question, were both children of Mrs. Macaulay, the life-rentrix, and neither of them had issue. The case does not raise any question as to the respective interests of Mrs. Garland and Mrs. Kinmont and their issue, if they have any.

It has not been disputed, and it does not appear to me to admit of serious controversy, that the death of a daughter, or of any other person, "leaving lawful issue" means and requires that they shall be survived by lawful issue of their body. On the other hand, the term "issue" may, according to circumstances, signify either the whole issue of the person named, whether in existence or not at the time of his or her death, or such of them only as are alive at that period. Primâ facie, and in the absence of words directly controlling the expression "issue," or of any provisions in the instrument from which it is matter of reasonable inference that the expression was not used in that sense, it must be taken to bear the wider of these meanings. The appellants maintained that Mrs. Hickling and Thomas Fair Macaulay, as issue of their mother, took a vested interest in the fee of the share life-rented by her a morte testatoris, and the strength of their contention lay in the argument that, in providing for the distribution of the capital on the death of the life-rentrix, the testator directed it

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to be made, not among issue then surviving, but "amongst the issue of each of my said daughters."

Having regard to the scheme of the settlement, in so far as it relates to the provisions made by the testator in favour of his daughters and their issue, there appear to me to be various considerations pointing to the inference that he did not intend any right to vest in the issue upon his death, which make the present case an exceptional one. There is no gift to issue, beyond what is implied in the direction to distribute, which depends upon the contingency of the daughter dying survived by issue. In the event of a daughter dying before the capital sum of 30,000*l.* has been invested during the period prescribed by the testator without leaving living issue, the interests and profits of her third pass to the surviving sisters or sister for their lifetime, and the fee of it to their issue. In the event of her death after she has entered upon the enjoyment of the life-rent provided to her, if she has living issue at the time of her death, the direction to distribute the capital life-rented by her amongst her issue is to take effect; if she leaves no issue surviving her, the capital goes to the residuary legatees. Whether the daughter dies before or after the period of investment, the gift over to the surviving daughters and their issue in the one of these cases, and to the residuary legatees in the other, which ignores the interests of issue of the deceasing daughter who predeceased her, appears to me to afford a strong indication that it was not in the contemplation of the testator to make any provision for such issue.

Although the case is one of nicety, I have come to be of opinion, differing from my noble and learned friends who are present to-day (1), that, when the whole provisions of the settlement with regard to the interest destined to the issue of daughters are taken into account, as they may legitimately be, in arriving at the meaning which ought to be attached to the word "issue," as it occurs in the direction to distribute, the testator must be held to have meant that those issue alone were to participate who survived the daughter from whom they are descended. I am not aware of any Scottish authority

(1) Lord Herschell was absent.

which has a material bearing upon that aspect of the case. *Selby* v. *Whittaker* (1), which was decided by an Appeal Court consisting of Sir G. Jessel M.R., with James, Baggallay, and Cotton L.JJ., although not the same in all its circumstances, comes nearer to the present question than any of the authorities which were cited at the bar. In that case it was held, reversing the judgment of Hall V.-C., that the words of a will directing the distribution of a fund upon the death of the life-rentrix among her children or other descendants, words which, standing by themselves, would have been sufficient to give a share to all the children or descendants whether alive or predeceasing, were to be read as limited to those of them who survived the life-rentrix by reason of other considerations arising on the face of the will, the chief of these being that the distribution was made contingent upon the death of the life-rentrix "leaving lawful issue or other lineal descendants her surviving," and that there was a gift over to the other daughter and her child or children or other lineal descendants in the event of that contingency not occurring. In the event of both daughters dying "without leaving any lawful issue or other lineal descendants her or them surviving," there was a gift over to other persons. In this case, upon the death of a daughter not survived by issue, the fee of her share passed to the residuary legatees. James L.J. (2) stated the point thus: "A testator gives a sum of money, 3000*l.*, to a daughter for her life, and then he says that if she should die leaving issue or descendants, then he gives it to her issue or descendants, but if she should die without leaving any issue or descendants, then it is to go over to somebody else. It is said that he means this—that if she dies leaving one descendant, the whole of her children and descendants, whether they survive her or not, are to share in the property, but that if there is not one of them living at her death, then none of them takes anything. That is a most monstrous and capricious intention to attribute to any testator."

I am of opinion that the interlocutor appealed from ought to be affirmed.

(1) 6 Ch. D. 239.

(2) 6 Ch. D. at p. 249.

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The following judgment of Lord Herschell was, in his Lordship's absence, read by Lord Watson :—

LORD HERSCHELL. The question to be determined in this case is the true effect of a clause in the trust disposition and settlement of Thomas Fair, dated September 5, 1862, whereby he made certain provisions for the benefit of his daughters. He directed that his trustees should, within five years of the period of his decease, invest on good security the sum of 30,000*l.* and pay the interest or annual profits to each of his three daughters for life, and, on the death of his daughters respectively leaving lawful issue, he directed his trustees to divide equally amongst the issue of each of his said daughters the sum of 10,000*l.*, being one-third of the sum directed to be invested.

It is not in controversy that in case any of the daughters died without leaving any issue surviving her, no benefit would be acquired by the representatives of any issue who predeceased her. But the question which has arisen is whether, in case a daughter should leave issue surviving her, the third part of the sum invested is to be divided among the issue so surviving, or whether the representatives of predeceased issue are entitled to share in the distribution. Though it is admitted that if all the issue of a daughter died in her lifetime their representatives would not be entitled to any part of the invested fund, it is said that if one of the issue survives the division is to be made equally amongst all the issue or their representatives. Ought this to be held, on a consideration of the terms of the will, to have been the intention of the testator? I do not think so. I think, with James L.J., who had to consider a very similar testamentary provision to that with which your Lordships have to deal, that it would be "a most monstrous and capricious intention to attribute to any testator."

It is to be observed that there is no direct gift to the issue of any of the daughters : such right as they have is derived from a direction to the trustees on the death of a daughter to divide equally amongst the issue the sum of 10,000*l.* Although I freely admit that in some circumstances it might be quite

proper to interpret these words as authorizing the payment of an aliquot share to the representatives of deceased issue, I do not think the words necessarily require that interpretation, or that any violence is done to them by holding that the division is to be made only amongst issue then in existence. Indeed, it seems to me the more natural meaning of the language.

No Scottish authority was cited to your Lordships which is at variance with the conclusion at which I have arrived as to the construction of the disposition now in question, or which lays down any rule or principle requiring a different construction. But reliance is placed upon several English decisions where somewhat similar provisions came under the consideration of English Courts. Your Lordships are, however, in the present case bound to administer the law of Scotland.

I cannot regard the statements of Lord Colonsay and Lord Gordon, made in particular cases, that there is no difference between the law of England and that of Scotland in the principles regulating the construction of wills, as a warrant for treating all the decisions of English Courts upon the construction of such instruments as authorities binding the Courts of Scotland, or as laying down authoritatively what the law of that part of the United Kingdom is. I think it would be very unfortunate if your Lordships were to do so. I am by no means satisfied that every rule which has been applied to the construction of wills in this country is a part of the law of Scotland. It is no doubt a sound canon of construction, applicable to both countries, that words of art must be interpreted in their technical sense, unless the testator has shewn that he is using them otherwise. But I think there has been too much tendency in England to go beyond this—to evolve rigid rules from decided cases, and to apply previous decisions to the interpretations of wills which have subsequently to be construed, instead of endeavouring to ascertain by a study of the particular instrument what was the intention of the testator.

I have referred so far only to the terms of the original testamentary disposition, because the codicil which increased the sum to be invested to 36,000*l.* affects only the amount

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involved, and no distinction can, I think, be made between the original 12,000*l.* and the 6000*l.* added by the deed of renunciation. For these reasons I am of opinion that the judgment appealed from is right, and that the appeal should be dismissed with costs.

LORD SHAND. After anxious and careful consideration of the provisions of the settlement of the testator, Mr. Thomas Fair, which were the subject of a full and satisfactory argument, I have found myself unable to agree with the judgment of the learned judges of the Court of Session. I am of opinion that Mrs. Hickling and Thomas Fair Macaulay, the children of Mrs. Macaulay, who predeceased their mother, had each a vested interest in a share of the sum of 18,000*l.* enjoyed in life-rent by their mother under the trust deed of settlement of the testator, their grandfather.

The question is one of interpretation or construction of a short provision relating to a sum originally of 30,000*l.*, but afterwards by a codicil enlarged to 36,000*l.*, of which the testator directed that his daughters, three in number, should have the life-rent. It seems to me that the case raises no question of Scottish as distinguished from English law. The general principles to be applied in the construction of the language used by the testator in the provision he has made are, I believe, the same in both countries, and the question is simply one of the meaning and legal effect of the language used.

After providing for the enjoyment by his daughters equally amongst them of the annual interest or profits of the capital sum, the settlement proceeds with the following clause, on which the decision of the case really turns, although no doubt, other parts of the deed may be referred to in so far as they throw light on the meaning of the testator. [His Lordship read the clause in question, and gave the facts, and continued :—]

By that clause a life-rent is given by the testator to his daughters, and the fee to their issue. In the construction of provisions to that effect, of which innumerable cases, with much variety of expression, have occurred, there have been, as might be expected, certain general principles or rules adopted

which have great weight in the determination of each particular case as it occurs, and which are of value as a guide or assistance to professional men in the framing of testamentary deeds.

The cardinal rule or principle to be kept in view is, of course, that effect shall be given to the expressed intention of the testator; but in the consideration of the language used the principles to which I have referred are of much importance. Thus, as applicable to the settlement in question, it is clear by the law of Scotland that a provision to one in life-rent only, with a fee to children, vests the fee in the children as a class, so that each child alive at the testator's death or born afterwards takes a transmissible interest at once, or, in other words, the vesting of the fee is not suspended till the death of the life-renter, with the result that vesting takes place only in such children or issue as survive that event. An express provision that survivors only of the life-renter shall take will, of course, receive effect; but if there be no such condition expressed, and no words used from which such a condition is clearly implied, the ordinary rule which favours vesting will take effect, with the desirable result that the persons, children, or other descendants called as "issue" who are made fiars may themselves make the fee available by way of provision for their own families or others, in case of their happening to predecease the life-renters.

Another principle which it is of importance to bear in mind in the determination of this case is that, although the bequest may be dependent on a contingency, this will not necessarily prevent the vesting. The time at which the contingency happens in a bequest to a class does not determine the vesting in the individuals composing the class. If the contingency should apply to the individual and relate to his capacity to take, as, for example, a bequest left subject to the condition that the legatee should attain the age of twenty-one years, there can be no vesting till he or she shall reach that age; but where the contingency applies to a class, and not as a condition of the capacity of the legatee to take, the contingency is not to be imported into the constitution of the trust so as to suspend vesting till the death of the life-renter.

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These general principles or rules are, I think, applied in the construction of settlements alike in England and in Scotland; but it is sufficient for the disposal of this case that they are part of the law of Scotland. That they are so sufficiently appears from two cases regarding provisions in settlements from Scotland which formed the subject of appeals to this House. In the case of *Carlton* v. *Thompson* (1) in 1867 Lord Colonsay, who gave the judgment of the Court, said: "The general rule of law as to bequests is, that the right of fee given vests a morte testatoris. That rule holds, although a right of life-rent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual nominatim or to a class. The postponement of the period of payment till the death of a life-rentrix does not suspend the vesting; nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed, the creation of a trust is a very usual mode of securing the interest of a life-renter, where the right to the fee is nevertheless intended to vest in the person or class of persons for whom it is destined. Although the jus dominii may be in trustees, the jus crediti is in the beneficiaries as a vested right. At one time doubts were entertained as to the case where the settlement was by a trust deed to hold for a life-renter and successive persons as fiars; but the tendency of recent decisions in that class of cases, and, indeed, in almost all cases, has been in favour of the vesting of the fee a morte testatoris unless the terms of the deed are such as to exclude that construction. The case of *Forbes* v. *Luckie* (2) supplies authority on most of these points. Lord Fullerton was the Lord Ordinary in that case; and the judges in the Inner House, while affirming his judgment, delivered their opinions fully. Lord Corehouse spoke very decidedly on the several points above referred to. Lord Gillies and Lord Mackenzie added the weight of their great authority. In subsequent decisions the authority of that case has been fully recognised and given effect to. . . . There may, however, be cases in which vesting is suspended. Thus, where the right is made

(1) L. R. 1 H. L., Sc. 232. (2) (1838) 16 S. 374.

conditional on a contingency personal to the legatee such as marriage, or arrival at majority, events or dates uncertain which may never have place, there is a presumption, though not insuperable, that a vesting or right to take was intended to be suspended until the occurrence of the contingency should be ascertained. So also an inference to that effect may be deduced from an express clause of substitution or survivorship applicable to the members inter se of a class to whom the fee is destined. These are the most usual indications of intention to suspend vesting. But neither of them occurs in the deed now under consideration."

Lord Cranworth, in *Carlton's Case* (1), in giving his concurrence, merely added : "I rejoice to think that the conclusion at which the Court of Session has arrived in this case with respect to the law of Scotland as I understand it, on the subject of vesting, is precisely similar to what the decision would have been if it had been an English case."

Again, in the case of *Taylor* v. *Graham* (2), in 1878, there are dicta by the learned judges which indeed formed the ground of judgment as to the same general principles applicable to the construction of wills. Thus Lord Gordon said, with reference to a provision of life-rent followed by a destination of the fee to children : "I think this leaves no room for doubt that the testator intended that the children of each niece should take a share of the fee of his estate. No doubt there were personal conditions attached to the children, namely, that they were not to take unless they attained the years of majority or were married. But as soon as these conditions were fulfilled, I think the children each became possessed of a vested right in the fee. There was no condition that the children should survive the life-rentrices. Of course the payment of the fee was postponed till the death of the life-rentrices, but this did not affect the vesting, which, I think, took effect on the children attaining majority or being married. No doubt there was a contingency in regard to these latter shares that the Gilberts might have left children and so have defeated the right of fee given to the children of the M'Cainshes. But this,

(1) L. R. 1 H. L., Sc. 244. (2) 3 App. Cas. 1287.

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I think with the Lord Justice-Clerk, was a mere contingency, and was not a condition suspensive of the vesting. As his Lordship says: 'It is in no respect a proper condition of the legacy. It is only an event, before the arrival of which it cannot be known whether the devolving clause has or has not taken effect in favour of the conditional institute. But when that is once ascertained James Taylor simply takes from the date of his majority or marriage—that is to say, it vests, and whether he predeceases or survives the life-rentrix is a matter of no moment.'"

In the same case Lord Blackburn said: "I quite agree in the judgment proposed. I think that the decision of this House in *Carlton* v. *Thompson* (1) goes a great way towards deciding this case. In the present case, Mr. Taylor's interest in the fund in dispute was subject, not only to the life interest of the two Misses Gilberts, but also to a bequest in fee in favour of their children attaining full age or marrying, and until the survivor of the Misses Gilberts died such children might come into existence and attain full age or marry, and so till then it was uncertain whether Mr. Taylor, however long he lived, would ever come into possession. I do not think, however, that does or ought to make any difference. It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once; which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event; but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that a testator intends the gift he gives to be vested, subject to being divested, rather than to remain in suspense."

There are considerations which have been fully recognised by the Courts in Scotland as of much weight in determining whether in the particular case the ordinary rule in favour of vesting shall not receive effect, but where vesting shall be held to have been suspended till the death of the life-renter. Two cases may be referred to with advantage on this head—the

(1) L. R. 1 H. L., Sc. 232.

cases of *Hay's Trustees* (1) in 1890, and *Douglas's Trustees* (2) in 1864. In both of these cases it was observed that (1.) the absence of any express condition of survivance; (2.) the absence of any destination over of the bequest in favour of persons to take after the fiars called on the expiry of the life-rent; and (3.) the absence of any indication of a reason to postpone the term of payment other than to provide the yearly income to the life-renter, were all important considerations against the view that suspension of the vesting till the death of the life-renter was intended. Lord Curriehill, in his judgment in *Douglas's Trustees* (2), said: "In the first place, survivance of the term of payment is not made an express condition of the provision. The payment is not postponed to a dies incertus, but to a date which was certain sooner or later, to arrive—the death of the life-rentrix. Further, there is also an absence of any substitution to the legatees, or what is called in England, a destination over. Now the absence of these things, which are the usual indications of an intention to suspend the vesting of legacies to the term of payment or solution, although it is not per se conclusive, leaves a strong presumption that no such suspension was intended, and what confirms this presumption is that there is no indication of the term of payment having been postponed for any purpose other than that of providing the yearly income to the widow."

Reverting now to the terms of the clause on which the present question arises, I observe that what the testator has said is that on the death of his daughters respectively leaving issue he directs his trustees to divide the funds life-rented "equally amongst the issue of each of my said daughters." The words are not qualified or restricted in any way so as to confine their meaning to issue alive at the life-renter's death. According to the ordinary construction of the language, they designate and include issue predeceasing the term of division or payment as well as issue surviving that term; and the authorities to which I have referred, on the rational grounds which are there fully stated, make it clear that unless the testator, by some addition to the language used, has shewn

(1) 17 R. 961. (2) 2 M. 1008.

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that the words are not to be taken in their natural and comprehensive meaning, then they shall have the effect for which the appellants have here contended. There is not, however, in the clause here in question a word to indicate that the benefit was given to surviving issue only. If that had been intended, the most obvious, and, as I think, natural mode of expression, as the clause is framed, would have been, after the words "on the death of my said daughters respectively leaving lawful issue," to add—"I hereby direct my trustees to divide equally amongst *such* issue," &c., in place of which the direction is to divide amongst *the* issue. There is no direction to pay to or divide amongst issue surviving the term of payment only, and there is no destination over, for, failing issue, the fund falls into residue.

The appellants' contention as to the meaning and effect of the clause, in my opinion, receives strong confirmation, if confirmation were needed, from the terms of two other provisions of the deed, the first relating to the residue of the estate, and the second to the contingency of a daughter dying without leaving issue before the succession to her life-rent provision opened up to her. In the former of these the testator has provided for the death of a son before the division of residue that—"the share of any one of them so dying leaving lawful issue shall be divided equally amongst his issue *alive at the period of said division*"—language in clear contrast with that used in the clause now in question. In the other provision for the contingency I have just mentioned, there is no such clause limiting the provision to surviving issue. The benefit is given by a direction that the money "shall be divided equally between the issue of my surviving daughters," or "should there only be one surviving daughter having issue, to be paid equally to such issue." It could not, I think, be argued that this clause, in the absence of words of limitation, has the effect of excluding issue predeceasing the term of payment.

The argument of the respondents against giving to the words of destination their ordinary meaning and legal effect rests on the circumstances—(1.) that the bequest is one which is made subject to a contingency which is said to make the provisions

so capricious that the language used should not receive its ordinary meaning and effect; and (2.) that the form of the bequest being merely to divide money on the death of the life-renter, in place of bequesting it by a clause of destination formally vesting it in the legatees, indicates that the division was to be among surviving issue only. To this last consideration I attach no real weight. In a great many deeds a direction to pay or divide a fund at a date which as here (the death of a life-rentrix) will certainly arrive has created vesting, and that a vesting a morte testatoris; and if this had not been so held, the intention of the testator would have been frustrated in many cases. In the deed itself now under consideration, even the fee of the important part of the estate is given in the same way by a direction, after legacies and other provisions have been fully met, to divide the residue amongst the testator's sons. The deed conveys the whole of the testator's estate to trustees, and all of the beneficiaries obtain the benefits conferred on them, simply by directions to the trustees to pay or to divide.

As to the circumstance that the provision to issue predeceasing the life-renters is made dependent on a daughter leaving issue surviving, while, if no issue should survive, the fund life-rented would fall into residue, it cannot be disputed that a bequest subject to such a contingency is unusual and somewhat capricious. But what then follows? Is the Court thereupon to disregard language, however plain, and to refuse to give effect to it, because of speculative considerations, because the judges think the testator did not mean what he has said, or that if his attention had been drawn to the matter he would have employed different language? It seems to me that the respondents' argument must go that length in order to their success. For the reasons I have stated, I think there is no ambiguity in the language used, nor any difficulty in giving the legal effect to that language. The testator has said that, if a daughter does leave issue, the fund shall be divided amongst the issue of that daughter without limiting the gift to issue then surviving, and the effect of such a provision is well settled; and, with deference, I cannot agree with those of my

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noble and learned friends who think that a consideration of the nature of the contingency, which is not one personal to the legatee and affecting his or her capacity to take, can warrant the House to give any but the ordinary meaning to the general words descriptive of the class to take the benefit.

On this peculiarity, of the particular contingency under which the bequest is given, which raises the only difficulty in the case, no authority has been cited from Scotland, and the ordinary principles relative to contingencies arising out of their nature, as already explained, must be applied.

But the two English cases cited in the argument seem to me strongly to support the appellants' argument. These cases were not dealt with on any view of a peculiarity in English law, but on precisely the same general considerations which arise here. The case of *Boulton* v. *Beard* (1) was, as it seems to me, identical with the present, and was decided in favour of the contention here maintained by the appellants. In the latter case, *Selby* v. *Whittaker* (2), Sir George Jessel, dealing with a provision similar in effect to the present, distinctly expressed the view that, capricious though the intention of the testator might be, and he thought it was capricious, unless there were other words "sufficient to make the interests of the children contingent on their surviving their parents," the capricious intention should receive effect; and I think that view sound.

On these grounds I am of opinion that the judgment complained of ought to be reversed, and that a declaration should be given: That in the opinion and judgment of this House the first and fourth queries of the special case should be answered in the affirmative; and I move your Lordships accordingly.

LORD DAVEY. The words which your Lordships are called upon to construe in the events which have happened are contained in the fifth provision of the will. [His Lordship then gave the facts, and continued:—]

With great deference to the Court below, and to those of your Lordships who think otherwise, I have found myself, after anxious consideration, unable to say that the two deceased

(1) 3 D. M. & G. 608. (2) 6 Ch. D. 239, p. 245.

children of Mrs. Macaulay can be excluded from a share in the trust legacy. It is an elementary principle in the construction of wills that a gift to a class after a life interest or life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency.

In the case of *Boulton* v. *Beard* (1), cited by the appellants, Turner L.J. thus expressed himself: "The first argument in support of a different construction is that the bequest to the children of Catherine Rayner being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent, and affect many decisions, affirming as it must the principle that where there is a gift to a class upon a contingent event the time of the happening of the contingency determines the individuals composing the class. That is not the rule."

The Lord Justice then quotes the judgment of Wigram V.-C. in *Bull* v. *Pritchard* (2), laying down the distinction between cases in which there is a gift over on a contingency, and cases in which the contingency is made part of the description of the class which is to take. There are many other cases to the same effect, but I will not trouble your Lordships with a citation of them.

The case of *Selby* v. *Whittaker* (3) was relied on by the counsel for the respondents; but when examined it appears to me to be an authority for the appellants rather than for the respondents. In that case the gift was on the occasion of the death of a daughter leaving lawful issue to pay the fund of her so dying to her children or other lineal descendants. So far,

(1) 3 D. M. & G. 608. (2) (1846) 5 Hare, 567. (3) 6 Ch. D. 239.

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your Lordships will observe the gift is almost identical with the one before you. But it was further provided that such children or lineal descendants should take per stirpes and not per capita, and there were other indications in the will which were relied on by the Court of Appeal as shewing that only surviving children or descendants were to take. Sir George Jessel in his judgment used the following words: "The only event in which there is a gift is upon their (the tenants for life) leaving lawful issue or other lineal descendants. I fully admit that on the authorities and the reason of the thing if that stood alone, followed by an immediate gift to children, though it might appear to be and would be a very capricious intention, because it would make the interests of the children, if they all died in their parent's lifetime, depend on whether one of them had left a grandchild who would not take anything; still there being no other words, that would not be sufficient to make the interests of the children contingent on their surviving their parents." Sir George Jessel in that passage relied, not only on the authorities, but (to use his own language) on "the reason of the thing."

It has frequently been stated by noble Lords in this House that there is no difference in the law of England and that of Scotland in the principles regulating the construction of wills. In the case from Scotland in this House of *Taylor* v. *Graham* (1) Lord Blackburn treated as applicable to Scotland as well as England the principle that "it is to be presumed that a testator intends the gift he gives to be vested, subject to being divested, rather than to remain in suspense." Of course, if there is any rule of law or canon of construction peculiar to the jurisprudence of either part of the United Kingdom, or even any uniform course of decision in the Courts of either part differing from the view taken by the Courts of the other part, effect should and must be given to it. But I am not aware of any such in the present case. The learned counsel for the respondents did not call your Lordships' attention to any rule or course of decision peculiar to Scotland, but relied largely on the English case of *Selby* v. *Whittaker*. (2) Nor do I understand either my

(1) 3 App. Cas. 1287. (2) 6 Ch. D. 239.

noble and learned friend opposite (Lord Watson) or my noble and learned friend whose judgment he has read (Lord Herschell) to rest their opinion on any speciality in the law of Scotland.

If, therefore, this were a gift on the death of the life-rentrix leaving issue to be equally divided between her children, I should myself have no doubt that any child living at the testator's death or born afterwards would take a share if the life-rentrix left issue, notwithstanding that he died in the lifetime of the life-rentrix. I do not think that the gift, being in the form of a direction to divide, affords any context leading to a contrary conclusion. You can equally well allot a share to a deceased member of a class as a living one. Then it is said that if you give a share to a deceased person you may be giving it to creditors or strangers claiming as legatees or otherwise. Very true, so far as regards the beneficial interest; but the same observation applies to a member of the class who survives the life-rentrix, but who may have previously become bankrupt or insolvent, or may have settled, sold, or mortgaged his expectant share.

The gift, however, in the present case is not confined to children of the life-rentrix, but extends to her issue of every degree. I am unable to see that this makes any difference in considering the question now before your Lordships. I can find no words and no context to modify or vary the ordinary construction of a class gift, or to rebut the presumption which always exists in favour of immediate vesting, so as to exclude any persons who are primâ facie members of the class from a share. The learned counsel for the respondents argued that on his opponents' view the word "issue" was used in different senses in the same sentence. But in my opinion that is not so. It means in each case descendants of every degree: "On the death of my daughter leaving any descendant, I direct my trustees to divide her share equally between her descendants." There is literally nothing more than the recurrence of the word "issue" which even raises a suspicion that the testator meant anything different from what I hold to be the plain meaning of the words he has used.

The gift, as I invite your Lordships to construe it, is no

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doubt unusual, and may be called capricious. But, in my judgment, it is not in any sense extravagant, and I do not think that your Lordships would be justified by any considerations of that kind in inserting words which are not there, or putting any but the ordinary meaning on the words which you find there.

The context of the will, so far from supporting the construction of the respondents, appears to me to be more favourable to that of the appellants. The gift under discussion is followed by a gift over in the event of any of the daughters dying, before the succession to the foresaid provisions opens up to them (i.e., in the lifetime of the testator), without lawful issue. In that event the share of the interest of the trust legacy, to which the daughter so dying would have been entitled had she survived, was to be divided between the surviving daughter or last surviving daughter for life, and the capital then was divisible between the issue of the surviving daughters, or, should there be only one surviving daughter having issue, to be paid equally to such issue. It would, I think, be found difficult to suggest that the issue of a daughter who predeceased her were excluded from this gift. On the other hand, in the residuary gift there is a contingent provision in the event of the death of any one of the residuary legatees before division of the share of any one so dying leaving lawful issue amongst his issue alive at the period of the division, shewing that the draftsman of the will knew how to provide by apt words for those only who should be alive at the period of division taking when he meant it.

I am, therefore, of opinion that the judgment of the Court of Session should be reversed, and it should be declared that Mrs. Hickling and Thomas Fair Macaulay, the deceased children of Mrs. Macaulay, are not excluded from a share in the sum of 18,000*l.* life-rented by her. No argument was addressed to the House as to the quantum of the share taken by Mrs. Hickling and Thomas Fair Macaulay which is involved in the second and fifth questions, and I do not think that all proper parties were before the Court to enable it to answer those questions in the terms in which they are framed. All your Lordships can do on the present appeal is to reverse the interlocutor of the Court of Session, and instead thereof direct

that the first and fourth queries of the special case be answered by declaring that the representatives of Mrs. Hickling and Thomas Fair Macaulay, in the events which have happened, are respectively entitled to a share in the whole sum of the 18,000*l.* life-rented by their mother, Mrs. Macaulay. The costs of this appeal should be paid out of the sum of 18,000*l.* life-rented by Mrs. Macaulay pursuant to paragraph 11 of the special case.

EARL OF HALSBURY L.C. I have had an opportunity of reading the judgments which your Lordships have just heard delivered, and, as I entirely concur in the judgments of my two noble and learned friends who have last spoken (Lord Shand and Lord Davey), I propose to add nothing to them.

Mr. *Gregory*. As to costs: the agreement as to costs did not contemplate any costs in the House as regards the appellants; and therefore your Lordships are free to decide the question of costs.

EARL OF HALSBURY L.C. We are all of opinion that it is a case in which the difficulty has been created by the testator himself; and my impression is that the costs ought to come out of the estate.

Adjudged, that the said interlocutor of March 12, 1896, *complained of in the said appeal, be reversed: And it is directed that the first and fourth questions of the special case be answered by declaring that the representatives of the said Mary Annie Fair Hickling, late the wife of the said Arthur Hickling and of the said Thomas Fair Macaulay, in the events which have happened, are respectively entitled to a share in the whole sum of the* 18,000*l. life-rented by their mother, the said Harriot Fair or Macaulay: And it is ordered that the cause be, and the same is hereby, remitted back to the Court of Session in*

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Scotland, to do therein as shall be just and consistent with this judgment and direction: And it is further ordered, that the costs of all parties, in respect of the appeal to this House, as between agent and client, be paid out of the said sum of 18,000*l. life-rented by the said Harriot Fair or Macaulay, the amount of such costs to be certified by the Clerk of the Parliaments.*

Lords' Journals, August 1, 1898.

Agents for appellants: *Hanbury, Whitting & Nicholson, Solicitors.*

Agent for respondents Mrs. Garland and Mrs. Kinmont and their trustees: *W. P. W. Phillimore, Solicitor, for Horne & Lyell, W.S., Edinburgh, and Kinmont & Maxwell, W.S., Edinburgh.*

Agents for Fair's trustees: *Keeping & Gloag, for Horne & Lyell, W.S.*

[HOUSE OF LORDS.]

THE MAYOR, &c., OF NEW WINDSOR AND ANOTHER . . . . . } APPELLANTS; H. L. (E.) 1898 Nov. 28.

AND

JOSEPH TAYLOR . . . . . RESPONDENT.

Tolls—Prescriptive Right—Extinguishment of old Franchise by Statute.

A municipal corporation having a prescriptive right to take certain customary tolls for the passage of carriages, cattle &c. over a bridge belonging to them, obtained in 1734 a local Act which, after reciting their right to take the customary tolls, enacted that the said customary tolls should be and remain vested in them, and empowered them to take the said tolls, with a variation as to the exemption of freemen of the borough. In 1819 the corporation obtained another local Act which repealed the former Act and empowered them to take down the old bridge and build a new one and to take tolls which varied from the old tolls in amount and subject-matter. This Act was temporary and had expired:—

Held, that the prescriptive right to take tolls had been merged in and extinguished by the statutory right given in 1734, and neither had nor could have been revived by the later Act, and that the right to take tolls expired with the later Act.

The decision of the Court of Appeal, [1898] 1 Q. B. 186, affirmed.

FROM a time long before living memory down to 1734 the mayor, bailiffs and burgesses of the borough of New Windsor had taken certain tolls for passage over the wooden bridge which crossed the Thames at Windsor. In 1734 the local Act 9 Geo. 2 c. xv. was passed, by which—after reciting that the mayor &c. were seized of the bridge and the way thereon, and were obliged by reason of their tenure to repair and maintain them, and were entitled to receive certain customary tolls for pontage and passage over and under the bridge, which tolls the Act specified, including 2*d.* for every passage of every hackney coach (not a freeman's); and that the bridge was then ruinous—it was enacted that the bridge and the way and the said customary tolls should be and remain vested in the mayor &c. and their successors, who should stand for ever chargeable for the repair and maintenance and new making of the bridge and

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way; and that the mayor &c. might demand and take of all persons (other than freemen of the borough) the respective tolls before mentioned, for horses, carriages, barges and other things. The exemption of freemen was thus extended from the tolls for hackney coaches to all tolls.

In 1819 the local Act 59 Geo. 3 c. cxxvi. was passed, whereby—after reciting part of the 9 Geo. 2 c. xv. and that the timber bridge was decayed and ought to be taken down and a new bridge built and that the then tolls would not defray the expense, therefore in order to enable the mayor &c. to build a proper bridge and defray the expense and keep it in repair for ever—it was enacted that as soon as the old bridge should be taken down or rendered impassable the 9 Geo. 2 c. xv. should be repealed and the mayor &c. might build a new bridge which should be vested in the mayor &c. for the time being for ever, and might demand and take the tolls specified by this Act. These tolls were in some respects larger than the former tolls and included other matters. There was no exemption of freemen and no toll in respect of barges. The Act also provided that if the new bridge should not be completed within five years from March 1, 1820 all the powers should cease except as to so much of the bridge as should have been completed. Sect. 54 provided that the corporation should continue to enjoy such rights, privileges &c. as were granted by their charters or to which they were entitled by prescription or otherwise as fully as before the Act. Sect. 57 provided that the Act should commence on March 1, 1820 and continue in force during twenty-one years and from thence to the end of the next session of Parliament. This term was extended by 5 Vict. c. viii. to thirty-one years further and from thence to the end of the next session. Other provisions are stated in the report below. (1) The corporation built the bridge and took the tolls but obtained no further Act.

The respondent having brought an action against the corporation to recover a toll which he had paid under protest, Lord Russell of Killowen C.J. gave judgment in favour of the corporation. This decision was reversed by an order of the

(1) [1898] 1 Q. B. 186.

Court of Appeal (A. L. Smith, Rigby and Collins L.JJ.) ordering judgment to be entered for the plaintiff, with a declaration that the corporation were not entitled to levy any tolls for the passage of Windsor Bridge or to close the passage of the bridge whether until payment of toll or otherwise howsoever.

Nov. 25, 28. *Crackanthorpe Q.C.* and *Sir Edward Clarke Q.C.* (*Courthope Munroe* and *J. R. Atkin* with them) for the appellants. The prescriptive right of the corporation to levy the tolls specified in 9 Geo. 2 c. xv. was not extinguished by that Act, which is of a purely declaratory character and does not destroy or purport to destroy pre-existing rights: see Co. Litt. 115 a: "There is also a diversity between an Act of Parliament in the negative and in the affirmative: for an affirmative Act doth not take away a custome; as the Statutes of Wills of 32 & 34 H. 8 doe not take away a custome to devise lands, as it hath been often adjudged." The effect of the Act of Geo. 2 was only to enlarge the remedy. The sole remedy for a toll is distress: Vin. Abr. "Toll," vol. 20 p. 297; but the local Act gave other remedies also. The exemption of freemen—who were well-known persons—made no difference in the declaratory character of 9 Geo. 2 c. xv., in which there are no negative words. A prescription may be preserved by statute; and when "a statute is in the affirmative only a man may prescribe for the same matter": Com. Dig. 5th ed. p. 99 title Prescription F. 3. The liability of the respondent to the hackney coach toll from which both before and after that Act freemen were exempted cannot in any case be affected. It might be otherwise if the statute had contained a fresh table of tolls; but it did not, and was purely affirmative. It may be admitted that the second Act could not operate to revive the prescriptive rights if they were abolished by the first. But they were not; and it was taken for granted that they were not when the Act of 1819 was passed, as that statute expressly reserves them. Certainly if the custom was in force in 1819 the 59 Geo. 3 c. cxxvi. could not destroy what was expressly saved by s. 54. In the Court below Collins L.J. relied on the

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Islington Market Bill. (1) But his Lordship misunderstood the words of Littledale J., which were not directed to the supposed merger of customary in statutory rights. *Mayor, &c., of Manchester* v. *Lyons* (2), on which the respondent relies, is not adverse to the appellants. Cotton L.J. (3) says: "In every such case it is a question to be determined by a consideration of the whole of the Act whether the rights given by the Act are intended to supersede the rights which previously existed." There is here no evidence of such intended supersession. Then he observes (4): "If you find the statute referring to an old franchise as subsisting and merely varying the powers which the grantee is to have as regards that franchise, then that is not superseding the old franchise, but enabling those who hold it to exercise rights of a larger character than they could have exercised under it." In the Manchester case the statutory rights varied widely in time, place, charges and other respects from the old custom which they were held to have superseded. That case, therefore, has no application to the present. The Act of 1734 confirmed the prescriptive tolls in substance, and did not extinguish them. The Act of 1819 may have suspended them but could not have meant to destroy them, and it expressly reserved all prescriptive and other rights.

Witt Q.C. and *Danckwerts* for the respondent were not heard.

EARL OF HALSBURY L.C. My Lords, there are one or two points in this case which may admit of subsequent investigation and decision, but there is one point which, to my mind, is perfectly conclusive, and which, it appears to me, is the only point necessary for your Lordships to decide: I mean the question of the effect of 9 Geo. 2 upon the then existing franchise, and the consequent decision that must follow upon the repeal of that statute. I am the more desirous of confining what I have to say to the effect of that statute, and the consequences following upon the repeal of that statute, because I cannot help feeling that this point could not have been so

(1) (1835) 3 Cl. & F. 513, 518.
(2) (1882) 22 Ch. D. 287.
(3) 22 Ch. D. at p. 307.
(4) 22 Ch. D. at p. 309.

prominently before the mind of the Lord Chief Justice as the other matters that appear to have been urged.

To my mind, the question is one which, when dissociated from the other questions with which it has been somewhat clouded, is a comparatively simple one. By prescription the appellants had the right to take certain tolls. They had that right by prescription, and the right of a tenant under the lord of the franchise to do certain things could not be contested; but the lord of the franchise had also certain rights in respect of the man who was under obligation to him, and if he had so pleased, and if there had been misconduct in the nature of a fraud, either upon him or upon those persons against whom the franchise was exercised, he might have had power to forfeit. That right was an important right, and a right which in early times was not infrequently exercised, but in this case the moment the Act of 9 Geo. 2 was passed that right was gone. That question does not depend on the mere identity of the sums to be exacted from the public. If there had not been a single change in any part of the things that were to be done, or powers to be exercised, the nature of the right itself, the root of the title under which a person invested with that right could use it against the general public, was gone as originally granted. The person empowered to take the toll was clothed with a new parliamentary authority, and was in fact acting under a statute. If there had been any misconduct in the user of the franchise, as it is then inaccurately called, the lord of the franchise would have no right to intervene: the person possessed of what was the new parliamentary right might act in defiance of the lord of the franchise. It is, therefore, clear to my mind beyond question that the nature of the right itself is completely altered by turning it into a statutory right, and that the right must continue, if it does continue, by virtue of the statute, without any power of revival or reverter back to its original nature.

My Lords, if that is the true view—and, by the Vice-Chancellor of the Duchy and by Sir George Jessel, I think the true view has been pointed out with great clearness (1)—it is

(1) 22 Ch. D. 294, n., 301.

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hopeless to contend that the original franchise of these appellants is continued by reason of the statute which gave them the new right being repealed. On the contrary, the effect of that is that all their right is gone. I desire to place my judgment upon that ground, and that ground alone.

Where a merely temporary statute supersedes an ancient franchise, it seems to me that it would be open to argument whether the mere fact of giving increased tolls for a short period, with a reference to Parliament as to what they may do in the next session following the expiration of the statute, does not point to an intention by the Legislature that unless some new application has been made to Parliament, and subject to that application, the ancient dues are intended to be absolutely got rid of. I say I do not decide that at present, it being unnecessary in this case, because the effect of the repeal of 9 Geo. 2 is conclusive here; but I do not wish it to be understood, as far as I am concerned, at all events, that the case would be unarguable apart from that consideration. It is open to argument whether the Legislature did not mean, "We do not intend that these rights, whatever they are, shall continue unless renewed by Parliament; if they are not renewed by Parliament, they are intended absolutely to disappear." That is an argument which may well have to be considered in any future case. At present the one proposition we have to deal with is that the right to take tolls rested entirely on 9 Geo. 2, and from the time when that Act was repealed, except in so far as the right to take the toll was continued by the temporary Acts, the right was gone; all that the appellants were entitled to rely upon was their statutory power; and as by the hypothesis the statutory power has expired, it appears to me that all power to levy a toll of any kind is gone.

Therefore, I move your Lordships that this appeal be dismissed with costs.

LORD WATSON. My Lords, I desire to rest my judgment in this appeal entirely upon the view which I take of the effect of the Act 9 Geo. 2 c. xv. upon the franchise which was previously possessed by the appellants.

I do not think it necessary in this case to consider the point, which does not seem to me to arise, how far the Legislature can add provisions to the terms of a franchise leaving the franchise standing and unimpaired. That they may do so is possible—I do not intend to express any opinion to the contrary—and if the Act of George II. had merely been an enactment to the effect that was contended by Mr. Crackanthorpe, it is quite possible that the franchise might have outlived the passing of that statute. But when the substance of the Act is looked to, there are a great many considerations which, to my mind, clearly point to this result—that the Legislature did not intend the franchise to subsist and be an available right to the holders; that their intention was to substitute for it a statutory right which was at least equivalent to the franchise, and to leave no other right standing; to regulate the rights of the holders of the franchise, or the rights and obligations of those who used their bridge. The enacting clause is very plain to this effect: "That it shall and may be lawful to and for the person or persons appointed . . . . by the said mayor, bailiffs, and burgesses, or their assigns, to collect the said tolls" (What are the said tolls? The tolls which they are accustomed by virtue of their franchise to collect), "and to take of all persons" (there the statute widens the exemption given to freemen, which is not altogether unimportant—the freemen are to be exempted); they are "to demand and take of all persons (other than freemen of the said borough) the respective tolls before mentioned"; in other words, they are to levy the franchise tolls. It would be out of the question to suggest that, having made statutory provision for the levy of those franchise tolls for the future under statutory authority, the Legislature intended the mayor, bailiffs, and burgesses to continue to levy the same tolls under their franchise.

Well, my Lords, what appears to me to have been effected by that part of the enacting clause of this statute is simply to create what it was quite competent for them to do—a statutory authority in the room of, and in substitution for, the right of franchise which was previously available to the mayor, bailiffs, and burgesses. The effect of that substitution of a new

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statutory authority for an authority derived from the franchise only was, I apprehend, on the clearest authority to determine the franchise—to put an end to it; and, accordingly, I think that matters stood in the position that there was no franchise; there was a perpetual right to levy according to the scheme substituted for the franchise certain sums for the bridge, and thereupon the mayor and burgesses go to Parliament for another Act. I do not intend to refer to the terms of that Act, or to discuss or consider what might have been its effect in different circumstances. If I am right so far as I have gone, the only consideration which it raises is limited to this point: Does it anywhere set up the franchise anew? In my opinion it certainly does not. To begin with, the Legislature cannot create a franchise—that is a matter beyond its powers; but I do not dispute their entire competency to create a statutory remedy, and statutory rights and statutory obligations, which will form the equivalent of a good franchise right; that it is undoubtedly in their power to do. But in the second statute and in its successor, so far as I can find, there is no attempt to do that; there is no new statutory right created: there is no substitution for the franchise created. All the clauses that are founded upon are clauses simply reserving certain rights and privileges which are assumed to have been, at the time the later Acts of 1819 and 1842 were passed, vested in the mayor and burgesses. But how far these reservations might reserve the right which was competent to and in the mayor and burgesses at that time it is not necessary to discuss. They could not have the effect of calling again into existence and revivifying a right that was dead and gone a century before.

On these grounds, my Lords, I think the judgment appealed from ought to be affirmed, with costs.

LORD SHAND. My Lords, concurring as I do in thinking that the judgment of the Court of Appeal should be affirmed for the reasons stated by your Lordships as to the effect of the statute of 9 Geo. 2, and the learned judges of the Court of Appeal having in their unanimous judgment so fully, carefully,

and, in my opinion, satisfactorily dealt with the question raised, I think it unnecessary to add any observations of my own.

LORD DAVEY. My Lords, the grounds upon which the Lord Chief Justice decided the present case seem to me to be summed up in one proposition which I will read from his judgment: The corporation "were entitled to take and receive the tolls mentioned in the Act" (9 Geo. 2) "by virtue of their prescriptive right, and all that Act did was" to give them "increased facilities for enforcing those rates and nothing more." I respectfully dissent from that proposition, and I cannot help thinking when I carefully read the Lord Chief Justice's judgment that his Lordship's mind was not directed to the view of that Act of George II., which has commended itself to the learned judges in the Court of Appeal and to your Lordships.

My Lords, I hold it to be an indisputable proposition of law that where an Act of Parliament has according to its true construction, to use the language of Littledale J., "embraced and confirmed" a right which had previously existed by custom or prescription, that right becomes henceforward a statutory right, and that the lower title by custom or prescription is merged in and extinguished by the higher title derived from the Act of Parliament.

Turning to the Act of George II., I have no doubt whatever that that Act did confer a statutory right to tolls of the same amount as that which the corporation had previously received by custom or prescription, although differing in one respect as to the persons liable to those tolls.

My Lords, when you turn to the preamble of the Act you find it recited that the corporation "are entitled to receive certain customary tolls for pontage and passage over and under the said bridge," and when you come to the enacting part you find that "the said customary tolls for pontage and passage over and under the same . . . . shall be and remain vested in" the corporation "and their successors." And that is followed by the enactment that it shall be lawful for the collector (I am reading it shortly) appointed by

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them "to collect the said tolls, to demand and take of all persons (other than freemen) . . . . the respective tolls before mentioned." I cannot conceive, my Lords, that that is not such a confirmation of the previous title of the corporation as would operate to give henceforward after the passing of that Act a statutory right to the tolls subject to the exception mentioned which would merge and extinguish the previous lower title by prescription and custom.

That is not a mere technical rule of law, but it is founded upon reason and substance, because the difference between a franchise by prescription and a statutory right will be at once recognised by every lawyer. There is a difference in its origin and in the evidence by which it may be supported. The root of title is an Act of Parliament, and it is sufficiently proved by the production of that Act of Parliament, instead of being evidenced whenever it is called in question by the more or less precarious proof which is necessary to support a prescription. And it differs also in its incidence; it is not liable to be disproved in various ways which are familiar to lawyers, nor is it liable to forfeiture or to be called in question by any process of sci. fa.

Therefore, my Lords, I am of opinion that what I conceive to be the ground of the Lord Chief Justice's judgment cannot be supported, and that from the date of the passing of the Act of George II. the right to these tolls was a statutory right and nothing else. The previous right by prescription was dead and gone.

The Act of George III. repealed the Act of George II. absolutely—I think there can be no doubt of that—and the 6th section of that Act, which the Lord Chief Justice treats as a mistake, I think was perfectly accurate in every respect. The 6th section of that Act contains these words: "And in consideration of the great expense" and so forth "and the ceasing of the several tolls which at present they are entitled to take and receive by virtue of the before-recited Act." According to my view, that statement was perfectly accurate: the tolls had been taken under the previously recited Act, the Act of George II., and did then cease by virtue of the

repeal. It is unnecessary, my Lords, to pursue the subject further, as it is not disputed at the Bar that if the first Act extinguished the title by prescription, the saving clause contained in s. 54 of the Act of George III. will not have the effect of reviving a dead title by prescription.

My Lords, I do not dissent from the observations of Rigby L.J. and Collins L.J. as to the different character in which the corporation stood as regards the bridge under the Act of George III. contrasted with that of the owner of the franchise. I think it sufficient to rest my judgment on the grounds I have mentioned; and I concur in the motion which has been made by my noble and learned friend.

LORD LUDLOW. My Lords, the question in this case is whether by the operation of certain Acts of Parliament some old franchise or prescriptive rights of the corporation have been extinguished. I am satisfied to rest my judgment upon the statute of George II. In my opinion the Act of George II. extinguished the old franchise or prescriptive rights and substituted in their place a new parliamentary title. I observe that the franchise title and the parliamentary title are two distinct and different things.

Now, that being so, it seems to me that this case is brought well within the judgment of Little V.-C., a judgment which was approved of by the late Master of the Rolls, Sir George Jessel, in the case of *Mayor and Corporation of Manchester* v. *Lyons*. (1) The Vice-Chancellor said: "But if after such a grant has been made by the Crown the three estates which conjointly constitute Parliament step in, whether on the solicitation of the grantee or otherwise, and by their joint act create the same rights or larger or different rights of the same nature and character in favour of the grantee, it seems to me that of necessity these parliamentary rights, emanating as they do from a paramount authority, must supersede those which the grantee was previously holding from the Crown alone, and that after the passing of such an Act there can be no continuing tenure by the grantee under his original title, nor a continuance

(1) 22 Ch. D. 294, n., 301.

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of his prior accountability on foot thereof to the Crown." It appears to me that this Act of George II. comes well within the terms of that judgment.

I think it unnecessary to say anything with regard to the Act 59 Geo. 3, resting as I do my judgment upon the Act of George II.; but it may be observed that the Act of George III. repeals the Act of George II. and creates a new set of tolls of a different kind but for a limited period. Now that limited period has expired, and if it is correct to say that the Act of George II. extinguished the old franchise or prescriptive rights, nothing remains, and the corporation are not entitled in this case to recover the tolls.

I entirely agree in what has been said by your Lordships with regard to this case.

Order appealed from affirmed and appeal dismissed with costs.

Solicitors for appellants: *J. J. Chapman, for P. Lovegrove, Windsor.*

Solicitor for respondent: *E. Betteley.*

[HOUSE OF LORDS.]

THE ATTORNEY-GENERAL . . . . APPELLANT;

AND

BEECH AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)
1898
Dec. 6.

Revenue—Estate Duty—Settled Property—Property passing on Death—Interest ceasing on Death—Surrender of Life Interest to Remainderman—Finance Act 1894 (57 & 58 *Vict. c.* 30) *s.* 1, *s.* 2 *sub-s.* 1 (*b*).

The tenant for life of settled property with a power of appointment appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest to the trustees of the settlement "to the end and intent that such life interest may merge in the interest in remainder of" her son; and died more than twelve months after:—

Held, affirming the decision of the Court of Appeal, [1898] 2 Q. B. 147, that the property did not pass on the death of the tenant for life to the remainderman within the meaning of the Finance Act 1894 s. 1, or s. 2 sub-s. 1 (*b*), and that estate duty was not payable by the remainderman under that Act.

BY a marriage settlement made in 1852 property was settled upon trust for the wife for life, and after her decease (in the events which happened) upon trust for such one or more of the children as she might by deed or will appoint. The wife (Mrs. Beech) survived her husband and by a deed in 1886 appointed part of the trust property to her son the respondent Howard Beech absolutely, subject to her own life interest. By a deed of December 18, 1894, Mrs. Beech surrendered to the respondents, the then trustees of the marriage settlement, all her life interest in the property above appointed to Howard Beech to the end and intent that such life interest might merge in his interest in remainder and that that property might be held in trust for him, his heirs, executors, administrators or assigns according to the nature thereof. The trust property consisted of real and personal estate. Mrs. Beech died in 1896. The Attorney-General filed an information against the respondents claiming that estate duty became payable under s. 2 sub-s. 1 (*b*) of the Finance Act 1894 upon the principal

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value of the trust property so surrendered as property passing on Mrs. Beech's death within the meaning of the Act. Pollock B. and Ridley J. gave judgment in favour of the Crown. (1) This decision was reversed by an order of the Court of Appeal (A. L. Smith, Chitty and Collins L.JJ.) declaring that on Mrs. Beech's death the trust property did not pass within the meaning of s. 2 sub-s. 1 (*b*) of the Act, and estate duty did not become payable on the principal value. (2)

Sir R. E. Webster A.-G. and *Sir R. T. Reid Q.C.* (*Sir R. Finlay S.-G.* and *Vaughan Hawkins* with them) for the appellants. The scheme of the Finance Act 1894 is to hit all property which passed or was settled to pass from one person to another on a death. The present case is within each of the first two sections of the Act. Sect. 1 imposes estate duty "in the case of every person dying after the commencement of this part of the Act, upon the principal value . . . . of all property, real or personal, settled or not settled, which passes on the death of such person." Those words are enough without more. This property passed on the death of Mrs. Beech by virtue of the marriage settlement. True the time of enjoyment for the son was hastened by the deed of 1894, but the property nevertheless passed under the marriage settlement on the mother's death: but for that settlement it would not have passed at all; the mother's surrender in her lifetime could not abrogate or annul the settlement or its effect. This view is strengthened by s. 2 sub-s. 1, by which "Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . ." Under the settlement the mother's life interest ceased on her death, and the extent to which a benefit accrued to the son by the cesser was the principal value. The question is not what any individual acquires or enjoys. As soon as the settlement was made it was stamped with liability to duty. The doctrine of

(1) [1897] 2 Q. B. 535. (2) [1898] 2 Q. B. 147.

merger has no effect: on Mrs. Beech's death it was not the life interest, but the principal value of the property which passed. The surrender of the life interest does not affect the "passing." The words "passing" in s. 2 sub-s. 1 and "ceasing" and "cesser of interest" in s. 2 sub-s. 1 (*b*) do not refer to the fact of the death of the person referred to, but mark a point of time, and describe the character of the interest which has to be valued. Duty must be paid once under the settlement, and these words fix the time when it becomes payable. The respondents' construction does violence to the words. If the son is exempt words must be inserted in s. 2 sub-s. 1 (*b*) so as to make it read: "Property in which the deceased or any other person *except the remainderman*." Why should the remainderman be in a different position from others? If a tenant for life sells his interest to A., and the remainderman sells his interest to B., and subsequently A. sells to B. or B. to A., estate duty is payable. So if the remainderman first assigns his remainder, and then acquires the life interest, the assignee of the remainder must pay duty. The act is aimed at each interest; the artificial life of the settlement is substituted for the natural life of the individual. The respondent on his mother's death was in the enjoyment of the property. Whence did he get it? Under the settlement. What came to him after his mother's death came not from her or by reason of any act of hers, but under the settlement. It is to be observed also that the words are "Property in which the deceased . . . . had an interest"—i.e., had at any time. The other construction demands the insertion of the words "at his death." The construction of the Court of Appeal would make the Act nugatory. Every life tenant might keep in his box a deed surrendering his life interest and when in fear of a short life might execute it. The present case does not come under s. 2 sub-s. 1 (*c*) for two reasons, because the deed of 1894 was executed by the mother more than twelve months before her death, and because the Customs Act 1881 as amended by the Customs Act 1889 does not require such interests to be accounted for: and see Hanson's Duties 4th ed. p. 106. It is the principal value which is affected by the

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Finance Act 1894. The real question is, Is the property under the dominion of the settlement? Here it was so. The son's title was under the settlement: indeed was the settlement: without it he had no title. Whether the property actually passed or not at the death it is to "be deemed to pass." And by s. 22 sub-s. 1 (*b*) "on the death" includes "at a period ascertainable on or by reference to the death." If there be any ambiguity in the Act the disastrous financial consequences which follow on the opposite construction should be considered.

Cozens-Hardy Q.C., *Levett Q.C.*, *W. M. Spence* and *Austen Cartmell* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, I have not been able to entertain any doubt that the judgment of the Court of Appeal is right, and that the judgment of Pollock B. and Ridley J. was erroneous.

The real difficulty I have in this case is in speaking with sufficient precision and at the same time proper respect of the argument that has been addressed to us. I do not deny the ingenuity with which it has been sought to invest ordinary language with some extraordinary and subtle meaning which I have not always been able to follow. The subject-matter seems to me to be clear enough. This is a statute which is intended on the face of it to impose a tax upon property passing on death: that is the meaning of the statute—that is what it purports to do; and in this case I do not see that any property did pass on the death. That seems to me to be the whole case. I am unable to follow any other proposition. It is said indeed that there was a life estate, and that when once a settlement has been made it is supposed to fasten and stamp upon every estate that may be comprehended within it an indelible obligation to pay estate duty at some time or another. Well, it seems to me that is not the natural meaning of the words. What the statute intended to make liable to pay duty is the succession by one person from another upon death; I do not say necessarily from the person who has died—there may be such a thing of course as a succession by reason of the death

of a person not immediately the former owner of the property in popular language, but some death settled between the parties as the period at which the estate should vest.

But that being the meaning of it, let us see what the facts are here. I assume for the purpose of what I am about to say that the twelve months' limit is out of the question. It is out of the question because, as a matter of fact, the period was longer than twelve months when the particular conveyance which is now sought to be charged with the duty was made; and according to Sir Robert Reid, who has said a good deal to induce me to take that view, it is out of the question for another reason which I will not stop to consider, because it may prejudice future inquiries if I express any opinion upon it. The question here is whether upon a conveyance inter vivos of the interest that the mother possessed, that falls within the language of the statute, "property passing by death." When the mother had passed her life estate by a conveyance inter vivos to her son, would anybody in the world, untainted by technical views, have said that that estate passed from the mother to the son upon death? Death had nothing to do with it. The moment that conveyance was made the son was completely master of the situation, and he might have sold the property the very next day. Then in what sense has it passed on the death? That seems to me to dispose of the question under s. 1.

But then it is said that there is certain property which is to be deemed to pass although it does not actually pass. I have already said that the Legislature had good reason to use those words "shall be deemed to pass" in a case where death is the point of time at which the estate is to pass from the one to the other.

My Lords, I think this is the whole question. I cannot argue it any further because it seems to me to speak for itself. It is not necessary here to say that Taxing Acts must be precise and particular, and that you have to ascertain the object of taxation, because I am really unable to fix upon any words which even by any doubtful construction can make the tax payable under these circumstances. The scheme of the Act

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(which I agree is a phrase proper to be used even in respect of a Taxing Act) is to inflict taxation upon property passing by death; and the one principle which seems to me to dispose of the whole case is that here there is no property passing by death at all; death has no more to do with it than any other immaterial circumstance in the case. That which passed the property, which did operate upon the property that passed, was the conveyance inter vivos which vested the property passed in the person to whom it was conveyed, independently of and having no relation to the death at all. It appears to me that the judgment of the Court of Appeal was right, and this appeal ought to be dismissed with costs.

LORD WATSON. My Lords, this is not according to my apprehension a very large question; it may be large in its scope, but it depends upon considerations which are very shortly stated in the statute which the appellants' counsel seek to interpret. The arguments used in support of their contention have been very subtle, very ingenious, and on the whole, excepting in their result, very satisfactory; but I certainly do not see my way to placing upon any taxing statute so wide an interpretation as has been submitted for our approval by the present Attorney-General and his predecessor in office.

I think the case lies exactly where my noble and learned friend on the Woolsack has stated it. The Act is one which grants to Her Majesty a right to taxation which is to be levied in the case of any person dying "upon the principal value of all property real or personal settled or not settled which passes on the death of such person." Taking these words by themselves, the construction of the taxing clause would, I think, necessarily be somewhat more limited than follows from the terms of the next section, the 2nd section, which enlarges the scope of the clause. It apparently was anticipated that a court of law might place upon these words, "which passes on the death of such person," a construction limited to property which passed in the ordinary sense of the term from the deceased into the possession and property of another person

after his death. But the 2nd section of the statute widens that interpretation very much; for it extends it to all cases where a survivor of the deceased takes a succession, or I should say rather, derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased.

My Lords, the present case is said to fall within sub-s. 1 (*b*) of that s. 2. I only read the first part of it; the rest is inapplicable: "Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." Now, there are two points in that definition in regard to which the present case utterly fails. "Property in which the deceased or any other person had an interest ceasing on the death of the deceased"—that is an interest in him or her or another at his or her death which did not cease except with his or her lifetime. Now, with regard to the property in question here, it is a right of life-rent which was not in the deceased at the time of her death; she had parted with it months before, and accordingly, having so parted with it by a deed inter vivos, it follows that, in the words of the remaining part of the definition, no benefit accrued or arose by the cesser of her interest.

Now it is said that the succession, the fee which was taken by the respondent, was taken by him under the settlement. That is true; but it was not taken by him in such circumstances as to render it a succession or interest which was liable to taxation under the Act with which we have to deal.

My Lords, for these reasons (I do not require to say more) I entirely concur with the judgment moved by the Lord Chancellor.

LORD ASHBOURNE. My Lords, I concur with my noble and learned friend on the Woolsack. This is a Taxing Act, and it is essential to see that the tax is expressly imposed, that the subject is not taxed without clear words, and that the natural construction is given to the words used. Here the express words do not support—they contradict the Crown's contention;

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for as a fact nothing passed on the death of the tenant for life. Practically the argument for the Crown requires the alteration of the words of the statute so as to include the case of a tenant for life who had previously had an interest which had ceased not on, but before the death. Indeed, the argument requires not only the alteration, but the insertion of words that the life interest should be deemed to continue down to the death notwithstanding previous surrender, conveyance, or merger.

My Lords, I think that the order of the Court of Appeal is quite right.

LORD MACNAGHTEN. I am of the same opinion.

LORD MORRIS. I concur.

LORD SHAND. My Lords, I also concur, and I have only to add that, concurring as I do with what has fallen from all your Lordships, I think the reasons given by the Court of Appeal by Smith L.J. and Chitty L.J. are entirely satisfactory and make the decision of the question quite clear.

LORD DAVEY. My Lords, I also concur, and it is really sufficient, so far as the 1st section is concerned, to say that this was not settled property at the date of the death, and that it did not pass.

My Lords, I only desire to say one other thing, and that is this; that when cestuis que trust become absolutely entitled to the trust funds in possession with power of disposition without the consent of any other parties, the settlement is at an end; the trustees are functi officio: they have no longer any duties to perform, they have no longer any interest to protect, their position is exclusively that of bare trustees for the persons absolutely entitled, and whether those persons choose to get in the outstanding legal estate or do not care to do so cannot make the least difference in their position as absolute owners with power of dealing with the estate; and it is a complete fallacy, in my opinion, to say that Mr. Beech, the respondent in the present case, was, after he took a surrender of

his mother's life interest, the owner of two separate interests. He was the absolute owner of the property, and one cannot be more than the absolute owner of the property. There is no single test of ownership that can be applied to his position at that date which shews that he was in any degree other than the absolute owner of the property. If he was the absolute owner of the property before Mrs. Beech's death, he remained absolute owner of the property afterwards, and there was no passing of the estate—that is, no change of ownership by reason of Mrs. Beech's death.

My Lords, this is not a mere technical doctrine—it is the expression of a fact. A man, it may be, had a conveyance from half-a-dozen persons, but from whomsoever he derives his title, however many be the persons who join in conveying to him, if he has got the absolute ownership he is the owner of one estate or interest, namely, the ownership in fee of real estate, or absolute owner of personal estate.

With regard to the 2nd section, it may be said (as Sir Robert Reid in particular argued) that although this property did not pass it is to be deemed to pass. I do not differ from what has been already said as to the construction of that section. It appears to me shortly upon that section that neither the deceased nor any other person had an interest ceasing at the death of the deceased—at the time when the duty attached, namely, the death of the deceased; and it also appears to me that no benefit can be shewn to have accrued or arisen in any form whatever to the respondent or anybody else by the cesser of that interest. And that seems to me to dispose of the case.

With regard to the difficulties raised by Sir Robert Reid as to the risk of evasion which this decision would lead to, I am not convinced that he takes a right view of the construction and effect of s. 2, sub-s. 1 (*c*); but it is not necessary to express any opinion about that, and I abstain from doing so. It may be, if he is right, that the point was overlooked by Parliament, or that Parliament thought that s. 2, sub-s. 1 (*c*), would hit it and were mistaken; but in either case I cannot see that it can in any way affect the construction to be put upon this Act.

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LORD LUDLOW. My Lords, if this Taxing Act is to be interpreted according to established principles, and if there is to be given to the words used in it their ordinary popular meaning, I can only say that I have not the slightest hesitation in coming to the conclusion that the judgments of the Court of Appeal were perfectly right; I concur with them, and I am unable to agree with the decision of the Queen's Bench.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 6, 1898.

Solicitor for appellant: *Solicitor for Inland Revenue.*
Solicitors for respondents: *Bell, Steward, May & How.*

[HOUSE OF LORDS.]

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THE NEW YORK BREWERIES COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE ATTORNEY-GENERAL . . . . RESPONDENT.

Revenue—Probate Duty—Testator Foreign Subject domiciled Abroad—Executor de son Tort—Intermeddling with Estate—Liability to pay Probate Duty—Penalties—55 Geo. 3 c. 184 s. 37—Crown Suits Act 1865 (28 *&* 29 *Vict. c.* 104) *s.* 57—*Customs and Inland Revenue Act* 1881 (44 *Vict. c.* 12) *s.* 40.

Upon the death of a testator, a foreign subject domiciled in America, shares and debentures in an English company, of which he was the registered holder in the books of the company in London, passed by his will to his executors in America, according to the law of his domicil. At their request the company paid to them the dividends and interest payable upon the testator's shares and debentures and transferred into their names in the company's books in London two shares and a debenture. The executors to the knowledge of the company had not obtained and did not intend to obtain probate in England:—

Held, that the company had made themselves executors de son tort: that they had "taken possession of and administered" part of the testator's estate (see 55 Geo. 3 c. 184 s. 37; 28 & 29 Vict. c. 104 s. 57) and

were liable to penalties, and to deliver an account and pay such duty as would have been payable if probate had been obtained in England.

The decision of the Court of Appeal, [1898] 1 Q. B. 205, affirmed.

Semble by Lord Davey that the company were persons who "ought to obtain probate or letters of administration" in England within the meaning of the Customs Act 1881 (44 Vict. c. 12) s. 40 (although they were not entitled to do so), because under the Probate Act 1857 s. 73 the Court had power in its discretion to appoint them administrators.

THE appellants were an English company incorporated under the Companies Acts with a registered office in London. They carried on a brewery business in New York. The report below (1) gives extracts from the company's articles as to the transfer of shares upon death. Clausen a citizen of New York domiciled there died in 1893 having by his will appointed two persons in New York his executors. To these men probate of the will was granted in New York, but they took no probate or administration in England. Clausen was the registered holder of ordinary and preference shares in the company and of debentures, and these executors requested the appellants to transfer to them all Clausen's shares and debentures and to pay them the interest and dividends due. The appellants after notice to the Inland Revenue authorities and in order to test the question paid to the executors the interest and dividends then payable in respect of Clausen's shares and transferred in their books into the names of the executors one ordinary and one preference share and one debenture then standing in Clausen's name.

The Attorney-General having filed an information against the appellants claiming an account and payment of duty, otherwise penalties under 55 Geo. 3 c. 184 s. 37 and the Customs and Inland Revenue Act 1881 (44 Vict. c. 12) s. 40, Wills and Grantham JJ. made a decree in favour of the appellants with costs. (2) This decision was reversed by an order of the Court of Appeal (A. L. Smith, Rigby and Collins L.JJ.) declaring that the appellants were liable to deliver to the Commissioners of Inland Revenue an account of the shares and debentures in the company registered in Clausen's name at his death and of the dividends and interest thereon, being

(1) [1898] 1 Q. B. 205. (2) [1897] 1 Q. B. 738.

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respectively personal estate of Clausen, and of the value of the said estate, and to pay such duty (including estate duty under 52 Vict. c. 7 s. 5) as would have been payable if probate or administration had been duly obtained in England in respect of the personal estate of Clausen; and ordering the appellants to pay the amount of such duty with interest at 3 per cent. from the date when the duty became payable; with costs in both Courts.

This being a test case the Crown did not press for penalties or double duty.

Moulton Q.C. and *Asquith Q.C.* (*A. M. Bremner* and *Gore Browne* with them) for the appellants. The liability of the appellants, if any, is purely statutory; but the Court of Appeal has held them liable independently of statute. The Stamp Act 1797 (37 Geo. 3 c. 90) s. 10 was the first which imposed a penalty. The penalty was for merely "administering" without taking out probate or letters of administration within six months of the death. That was repealed by 33 & 34 Vict. c. 99. The Stamp Act 1815 (55 Geo. 3 c. 184) by s. 37 imposes a penalty on every person who "shall *take possession of* and in any manner administer any part of the personal estate and effects of the person deceased" without taking out probate or letters within six months. Both taking possession and administration are necessary under the later Act upon which the information is founded. This Act makes the offender liable for the penalty—not for probate duty—and for the imposition of the penalty both conditions are necessary; neither existed here. First there was no "taking possession." Shares cannot be taken possession of—at all events in the way suggested: it would be a strained use of language to say that registering a title is "taking possession." They were the company's shares. So of the payment of dividends and interest. They were paid out of the appellants' funds, and if paid to the wrong person will have to be paid over again. It is not sufficient (even if it were the case) to establish that the appellants made themselves executors de son tort. Acts much short of "taking possession" would suffice for that.

[THE LORD CHANCELLOR referred to *Padget* v. *Priest.* (1)]

The terms "executor" and "executor de son tort" are by no means coextensive. Secondly, there was no "administering." The transfer of names and payment of dividend or interest are not administration. Executors could not do what the company did—transfer shares and pay dividends. Nobody however clothed with administrative authority could do that except the company. Therefore the company did not usurp the authority of executors or intermeddle with assets or administer or in any way make themselves executors de son tort. Again, executors may properly pay and receive before the grant of probate. Their title is from the will and not from the probate; and the will is made according to the testator's domicil. In s. 40 of the Customs Act 1881 double duty is imposed on any one who "ought to obtain probate or letters of administration" and fails to do so. But the company being neither beneficiary nor creditor were not in a position to do either of those things: it is not a case of "ought"—the company could not. The recognition of B. instead of A. as a shareholder is neither "administering" nor "taking possession." The combination of the two conditions shews that any act of administration, to be within the statutes, must be of a possessory character. The Crown Suits Act 1865 (28 & 29 Vict. c. 104) s. 57 uses the same language as the Stamp Act 1815: but the Crown has not proceeded under that Act; perhaps because they would thereby have waived the penalties. Probate duty is not made a debt by any statute from any person. It is made payable in certain circumstances, and is really in the nature of a toll: it is the price of obtaining a legal title in an available form. It is not a death duty. No one is bound to take out probate or letters of administration, though the Legislature has taken sufficient steps to ensure their being taken out. Sects. 27 and 40 of the Customs Act 1881 apply to actual applicants for probate or letters, or to those who ought to be such applicants. The appellants come under neither section. No one can obtain probate except the executor named in the will, and none can obtain administration except next of kin, creditors, or persons

(1) (1787) 2 T. R. 97.

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specially appointed under the Probate Act 1857 (20 & 21 Vict. c. 77) s. 73. The appellants have none of these qualifications. They are in no sense executors de son tort. An executor de son tort is a person, not being an executor, who by his acts has estopped himself, as against persons interested, from denying that he has acted as executor. No such estoppel exists here. But the term "executor de son tort" is not found either in the Crown Suits Act 1865 or the Customs Act 1881. In no stage of the transactions were the shares in the appellants' possession; and the analogy of the common law applies, by which a man could not commit larceny of goods in his possession. The appellants were never even bailees and are not in any particular liable to the information. The only case at all like the present is *Fernandes' Executors Case* (1); but that was not a case of penalties, and Giffard L.J. entirely overlooked the words now in force, "take possession of." "Take possession" implies that the person was not previously in possession. If there was ever any possession by the company of these shares and debentures they were in possession at the date of the death. They did no act which gave them further or other possession after the death. The appellants were not executors de son tort; but even if they were they did not "take" possession. If any persons made themselves executors de son tort it was Clausen's executors and they are liable, if anybody is.

Sir R. E. Webster A.-G. and *Sir R. B. Finlay S.-G.* *Vaughan Hawkins* with them) for the respondent. The Queen's Bench Division acted on the principle that the persons named in the American will were executors. But that is a matter of foreign law, and these gentlemen can only obtain title by applying to our Courts. The appellants' counsel have abandoned the foundation of the judgment in their favour. Any fresh departure may constitute "taking possession." The analogy of larceny has no basis, because if a bailee broke bulk he was guilty of larceny, and what the appellants have done is analogous to breaking bulk. The appellants' argument, if accepted, would altogether exempt shares in public companies from probate duty. The Stamp Act 1815 s. 37, which imposes

(1) (1870) L. R. 5 Ch. 314.

a penalty of 100*l.* and 10 per cent. of the duty, involves the liability to pay duty, though the penalty is often less than the duty. In this case, for example, the duty would have been 1260*l.*—the penalty about 200*l.* The argument founded on the Customs Act 1881 s. 40 that the appellants are not persons who "ought to obtain probate," because they could not, is unsound. Two courses were open to them: first, s. 73 of the Probate Act 1857 supplies machinery for this exact case: and the Court would have appointed an administrator for the assets in this country; or, secondly, they could have sat still until a proper executor made claim. There was no question of agency: but they intermeddled with the testator's property in this country and thus created an executorship de son tort. See Wms. Exors. 9th ed. 216, 1827. They are consequently liable to duty on the estate situated in this country. The classes of property chargeable with duty are shewn in *Attorney-General* v. *Hope* (1), *Attorney-General* v. *Brunning* (2), and *Attorney-General* v. *Bouwens*. (3) See Stamp Act 1815 s. 2. Sects. 37 and 38 of the Act define the obligation to take out probate and pay duty. These sections constitute the legislation as to the duty in the first instance. Sects. 40 and 41 deal with the case of the duty paid being either too high or too low, and furnish a precise analogy to a case in which, like the present, there has been no probate at all. When probate is taken out it is only valid to the amount covered by the stamp. Insufficient probate is void: *Hunt* v. *Stevens*. (4) The executor cannot recover for his testator's estate more than the sum represented by the probate: *Jones* v. *Howells* (5); and where property has improved in value between death and probate, duty must be paid on improved value: *Doe* d. *Richards* v. *Evans*. (6) See also *Carr* v. *Roberts* (7) and *Hicks* v. *Keat*. (8) The fact and extent of obligation having thus been ascertained, the appellants are liable under s. 57 of the Crown Suits Act 1865 (28 & 29 Vict. c. 104) to deliver an account and pay such

(1) (1834) 2 Cl. & F. 84.
(2) (1860) 8 H. L. C. 243.
(3) (1838) 4 M. & W. 171.
(4) (1810) 3 Taunt. 113.
(5) (1843) 2 Hare, 342.
(6) (1847) 10 Q. B. 476.
(7) (1831) 2 B. & Ad. 905.
(8) (1840) 3 Beav. 141.

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duty as would have been payable if probate had been obtained; and having neglected to obtain probate they are liable under s. 40 of the Customs and Inland Revenue Act 1881 to pay double duty.

Asquith Q.C. in reply. The words "take possession" point to acts such as could have been done by an executor or administrator; but the appellants have done no such acts. The cases cited of insufficient duty have no application. No executor de son tort has ever been sued by information for probate duty. Indeed no Act before the Crown Suits Act 1865 created a liability for probate duty, and here the Crown has not proceeded under that Act.

[THE LORD CHANCELLOR referred to *Hiort* v. *Bott* (1) and *Hollins* v. *Fowler*. (2)]

EARL OF HALSBURY L.C. My Lords, in this case I suggest to your Lordships that the judgment of the Court of Appeal is perfectly right, and that this appeal ought to be dismissed with costs.

It appears to me that the question lies in a somewhat narrow compass. A good deal appears to have turned, in the course of the argument, upon the peculiar nature of the property to which the act here complained of as an act of administration related. But, apart from that question of the peculiarity of the form of property, let me deal with the case first as if those considerations did not arise. The property—I will explain presently what I mean by the word "property"—is in England and belonged to a person who is now dead. That property could only properly be taken possession of or administered by a person who by law was qualified to deal with it. It is idle to suggest that in the Taxing Acts, where they are dealing with English finance, the words "executor" or "administrator," which terms we use popularly as applicable to a person who fills that character, to whatever country he belongs, are used in those statutes in any other sense than as meaning an English executor or an English administrator dealing with our own financial system. Undoubtedly the persons who are concerned

(1) (1874) L. R. 9 Ex. 86. (2) (1875) L. R. 7 H. L. 757.

in this case, having the control and dominion over the property in question, did an act whereby the title to the property belonging to the deceased person became vested in somebody else, and they are not either "executors" or "administrators" in the sense in which those words are used in the Taxing Acts. Primâ facie therefore they are executors de son tort, and, primâ facie, as it appears to me, they have taken possession of and administered the property in respect of which this question arises.

My Lords, I do not suppose that if the case had arisen in this way, that it had been something which was capable of a physical handling, and that the company had handed over that thing to persons who claimed to be possessed of it by reason of the will of some one in New York, any doubt could have arisen that they, in so handing over those subjects of property capable of a manual treatment, were executors de son tort and liable probably under each one of those sections which have been brought before us.

Then, my Lords, that brings us to the question whether the point, which I have reserved for consideration, when I use the word "property" makes any difference here. In one sense it is true that you get into a difficulty by treating the word "property" as meaning something necessarily connected with physical possession, and capable therefore of being treated by manual delivery; but if one comes to analyse its meaning, it is manifest that a great many things, choses in action, with which we are dealing are, in the ordinary sense of the word, "property," and capable of being treated, not indeed by physical handling, but by documents of title and instruments recognised by the law as transferring the title, the incorporeal right to sue (that is what is strictly comprehended in such phrases), documents which are capable of being enforced and treated as subjects of property.

My Lords, the condition of things here is this: Here is an incorporated company, and the deceased person is entitled to his aliquot share of the profits earned by that company. He dies, and according to the constitution of the company when a shareholder is dead the only person who is to be recognised as

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having a right to deal with his share is—I will put in the word which by implication is manifestly there—an English executor, or an English administrator. The company therefore, being now in possession of the share of the profits which belonged to the deceased person, are bound to see that they do not hand it over, or hand over anything that represents it, to any person who is not entitled to deal with it. That is their duty according to their constitution and according to law, because they are in possession of something which is available as assets of the testator's estate, bona notabilia, in this country. Then what do they do? They think proper to create a title in a person who has no authority to receive it on behalf of the dead person even according to the constitution of their own company. I cannot doubt that if we were dealing—that is the reason why I quoted the case of *Hiort* v. *Bott* (1) to Mr. Asquith at the conclusion of his argument—if we were dealing with an action of trover and you had improperly indorsed the document of title to goods, although you had done it innocently, and thereby enabled one person to obtain property which in truth belonged to another, you would be liable for damages in trover by reason of that erroneous indorsement. It was so held in the case I have mentioned, in the Court of Exchequer, and also in another case in this House. (2) That is the state of the law. Well then, suppose this same transaction to have so taken place that innocently the appellants had been induced to do this, notwithstanding the innocence of intention, it might well have been that they would have erroneously and improperly created a title in somebody else, the result—the natural and intentional result—of which was to enable a stranger to take possession of property which did not belong to him but belonged to somebody else, then the question might have arisen whether, even in that event, the company would not have been liable.

But your Lordships are not called upon to decide that extreme case, because here it is manifest, from the record before us, that the company have acted with their eyes open—I do not mean to make any reflection upon them, for they appear to have taken a very natural and sensible course in

(1) L. R. 9 Ex. 86. (2) See *Hollins* v. *Fowler*, L. R. 7 H. L. 757.

order to have the question of law tried; but in order to have the question tried it is to be assumed against them that they have acted with full knowledge of the facts, and that full knowledge of the facts imported this: that they knew that by the entry in their register which they made they enabled property to be diverted from one person who, in this country, was by law entitled to it, to another person who had no such title at all.

Under these circumstances, my Lords, I feel very great difficulty in understanding what is meant by some of the expressions used in the Court below. "All I can say," says Wills J., "is, that it appears to me that the defendants have not really intermeddled with the administration of this estate." In what way could a person, dealing with this particular class of property, otherwise intermeddle with the estate? The appellants have done that which, as I say, has created a new title in somebody else. The peculiar character of the property is such that it does not admit of its being manually and physically handed over; but they have done a legal act, and by virtue of that legal act they have enabled it to be dealt with by somebody else, and made available by him for any purpose he desires. It seems to me, therefore, that the words of the learned judge are a little difficult to understand. Then, my Lords, the learned judge goes on: "They have simply done that which the common law of England gives them the right to do, namely, to pay an executor." They have done nothing of the sort. The learned judge must forgive me for saying, when he says they have paid the executor, they have done no such thing. They have paid a person whom the learned judge calls an executor, but who is not an executor within the meaning of this Act; and when the learned judge says that they "have simply done that which the common law of England gives them the right to do, namely, to pay an executor without asking him for proof of his title by the production of the probate," I am afraid he forgets for a moment that what was done here was done with the full knowledge that the person whom they paid, not only was not an executor, but had given distinct notice that he never intended to become an executor within the meaning of

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the English law. Therefore I have considerable difficulty in following the learned judge's argument.

My Lords, I find that the other learned judge, Grantham J., says: "This company are not administering the estate in any way; they are not the persons who ought to administer the estate"—in those latter words I quite agree—they ought not; but as to whether they did administer the estate or not, I have already dealt with that point—"they are not the persons who ought to take out probate, and therefore under those circumstances I cannot see how they can be liable." To my mind the scheme of the Act, in fact, of the whole of the Acts, is very plain indeed, and I think the words, of which we have heard so much, namely, the "person taking possession of and administering" the estate, are very sensible words, and very clear words, to indicate what the Legislature meant. They are dealing with a subject-matter which involves this: that in this country no person is entitled to deal with an estate unless he is one of the persons who are by law entitled to deal with it, namely, in the case of personal property an executor or an administrator, and the law says that if a person without being so entitled takes possession of and administers it certain consequences shall follow.

I have already, for another purpose, called attention to the fact that the mere indorsement of a warrant for delivery of goods has been treated as a conversion, and it really would be frittering away the meaning and substance of language to suppose that where the person happens to be actually in possession of the document, the title which enables the estate to be dealt with, he does not take it because it is already in his possession. If he alters the character in which he holds it and gives the property in it to one person rather than another, it appears to me that the moment he has done that he has "taken possession of and administered" it in the sense which this Act of Parliament is intended to involve.

It appears to me, therefore, my Lords, that the appellants are clearly within those words, and are liable to the duties and the penalties indicated by this section. I do not think that the matter admits of elaborate exposition. We have had a long

argument upon the subject, but it all comes to this: that because this particular form of property is conveyed in a particular way, so that under particular circumstances you have not, what I may call, a physical act of handing over the property, but you have merely a signature in a book, if you alter in the register the name of the person entitled to the goods, then, although that has the effect of creating a new title and giving the complete command over the property with which you are dealing, that (it is said) is not "taking possession of and administering" within the meaning of the law. It appears to me, my Lords, that so to treat it would be entirely to alter the ordinary use of language, and to suppose it to be fenced round with technicality from which I think it is happily free. In my opinion there was here a "taking possession," and there was an "administering" within the meaning of the law, and therefore the persons who have done that are liable to these penalties and liable to the payment of this duty. Accordingly I move your Lordships that the judgment be affirmed and the appeal dismissed with costs.

LORD WATSON. My Lords, in my opinion the appellants in this case have not only taken possession of part of the estate of the deceased, but have proceeded to administer it. I think they have taken possession of it in this sense: that, having a share which belonged to the defunct in their hands for certain purposes, they did take possession of it for other purposes which were not legitimate, and for which they had no authority, and without the express sanction of the executors named after they had obtained letters of probate. The result of it is that, having taken that possession, they have used it for this purpose: for performing the first act of administration which executors having probate would have performed for themselves, with a view to, and as the first step towards, their administration.

My Lords, I do not think that the 57th section of the Act 28 & 29 Vict. c. 104, requires or prescribes that the persons, who are there described as "taking possession of and administering" the estate of a deceased, should, in order to bring them within the sweep of the clause, be persons who could,

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if they had chosen, have taken out probate in their own name. I do not think that is necessary. It may be that some of the persons who are within the purview of the clause are persons who might have taken out probate, but do not, within the period prescribed by the Act. If so, they are within the scope of these enactments; but they cannot remove themselves beyond the reach of these enactments by simply shewing that they are persons who are interfering without any legitimate title, and who could not have possessed themselves of a legitimate title.

My Lords, the clause gives them a defence within a certain period if they have a title to take out probate. They are entirely without that defence if they act as executors without having that title. That is the position of the present appellants; and in my judgment the order of the Court of Appeal is in strict compliance with the Act, and ought to be affirmed.

LORD SHAND. My Lords, I am of the same opinion, and as the House is affirming a decision of the Court of Appeal I shall only add a few words to what has been said by your Lordships in giving the grounds of judgment.

It is to be observed that this company have transferred a share and a debenture which belonged to the deceased owner in America, not only without having any title presented to them by an executor who has obtained probate in this country, but they have done so after a distinct intimation that there was no intention on the part of the persons who obtained the transfer to apply for English probate, and, in fact, knowing that they meant not to do so.

This last circumstance is of importance, because it displaces entirely the application of those cases in which persons who were debtors to a deceased have been found entitled to deal with an executor nominate, although he had not taken out probate, on the assumption that that executor did mean to take out probate, and, therefore, that the transaction between the parties would be valid so far as concerns the probate duty. It is clear that there was no such intention here; and therefore

those cases, which make the action good in respect of bona fides, have no application.

In that state of matters, if this question had arisen in regard to a movable estate of a different character from a share in a joint stock company—for example, in regard to goods or furniture of value in the hands of a custodian or warehouseman—I cannot suppose that any argument such as has here been raised on the part of the appellants could have been maintained. Suppose a person in possession of furniture thinks fit to act upon a foreign nomination of an executor without probate being taken out, he hands away the goods or delivers the furniture to that person who has no title as an executor in this country. What is the position of matters in that case? It appears to me that the custodier has himself changed the possession which he had. He had possession for the deceased; he has taken the possession himself, and, having got possession, he has transferred that possession to some one else. It is quite true, my Lords, that in that case he has not taken possession for his own behoof, and never intended to use the possession for his own behoof. It is also true that the possession was of a temporary character only; but although both those elements are present, it is nevertheless a conversion: there is on his part a taking possession of, an intermeddling with, these goods and a dealing with them, or administering them, in the act of handing them over to a third party who had no right or title to them.

I think it would be very unfortunate if there was a different law applicable to shares in a joint stock company or choses in action in this country. There is no real difference in principle. It is clear that, without the act of the intervener, without the act of what I call the intromitter, in a case of that kind, whether as regards goods or company shares, the possession could not have been changed, and a fresh title in another party could not have been created.

Therefore, my Lords, I concur with your Lordships in thinking that this company, in agreeing at their own hands to transfer to a third party who had no title to it as executors,

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the property of the deceased, were "taking possession of and administering" that estate. It may be that the expression "take possession of" admits of the criticisms made upon it at the Bar as applicable to a company's shares; but in substance it is impossible to shew that that case is different from the other case which I put with regard to movable subjects, of which a transfer of this kind is made. I am, therefore, of opinion with your Lordships that there was here a "taking possession" on the part of this company. The right could never have been transferred if they had not interposed or intervened and, to that extent, intromitted in this estate. I think, therefore, that the result was that they became executors de son tort.

Something has been said about an information not lying in a case of this kind. For my part, I think it is right to say that the decided cases which have been cited seem to me fully to warrant such an information. Those cases, no doubt, were of this class, where an executor who had a title had given an insufficient return and the Crown required by an information that the estate, which had been underestimated, should in the new proceeding be estimated at its proper value and duty paid upon it. There were no special enactments in the statute that hit that particular case and so warranted an information; those cases proceeded upon the broad principle that, the executor being liable to make a larger return, an information would lie although there was no provision that it should do so in the statutes. It appears to me, my Lords, that an executor de son tort, a person who has intermeddled with an estate and so made himself liable to duty, is in no better position than an executor who had a right but who had given an insufficient return. I think, therefore, that the principle of those cases applies to the case we now have to decide; and, therefore, I am of opinion that an information lies, and that effect should be given to it, and that the decision of the Court of Appeal should be affirmed. It seems to me, further, that by the terms of s. 40 of the Customs Act probate duty is made a debt due by the person who intromits with the deceased's estate, as was here done.

LORD DAVEY. My Lords, I also concur in the judgment proposed, and I will put the grounds of my opinion very shortly.

In my opinion the company, by the action which they took of altering the name in the register, taking the shares out of the name of the deceased shareholder and putting them in the names of two gentlemen who requested them to do so without the authority of an executor or administrator duly authorized to give such direction by the laws of this country, did appropriate in their hands, and took upon themselves to exercise control and dominion over, both the shares and the debenture and also the dividends. I think in principle the same considerations must apply to all the three. If a man who owes money to a deceased person takes upon himself to pay that money to some one who has no authority to receive it, I think he does an act which is an appropriation in his own hands, and asserts a right to exercise control and dominion over the debt.

I am therefore of opinion that the company did take possession of and administer these shares, debenture, and dividends within the meaning of the section of the Act of Geo. 3 which has been referred to.

My Lords, I also think on s. 40 of the Customs Act, 1881, that an executor de son tort is a person who ought to obtain probate or letters of administration. It is quite true that an executor de son tort is not entitled of his own right to take out probate or to obtain letters of administration; but the section in the Act does not say a person who is entitled to take out probate or obtain letters of administration—it says, a person who "ought" to do so. Now a person who takes upon himself to administer an estate is a person who ought to obtain proper authority to do so before he takes upon himself to administer the estate; and I do not think it is giving too large a meaning or extension to the words of this section to say that an executor de son tort is a person who ought to obtain letters of administration before he intermeddles with the estate, and that, therefore, he is liable to the penalties imposed by the section to which I have referred. Mr. Asquith argued at first that he could not do so; but the Solicitor-General pointed out s. 73 of the Probate Act, 1857, which would enable the Court, if it had

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thought fit in this case, as the persons appointed executors were out of the United Kingdom, to appoint the company, or some person on their behalf, as the administrator of the deceased, either permanently or temporarily; and before they took upon themselves to intermeddle with the estate, and to take possession of and administer the estate, I think they were bound to have made an application for that purpose. Therefore, without any straining or doing violence to the words of this section, they are persons who ought to have taken out letters of administration.

LORD LUDLOW. My Lords, I entirely concur with what has been said by your Lordships, and I feel that I can add nothing.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 8, 1898.

Solicitors for appellants: *Burn & Berridge.*
Solicitor for respondent: *Solicitor for Inland Revenue.*

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LONDON AND NORTH WESTERN AND GREAT WESTERN JOINT RAILWAY COMPANIES . . . . } APPELLANTS;

AND

J. H. BILLINGTON, LIMITED . . RESPONDENTS.

Railway—Charge for use of Sidings—Arbitration—Jurisdiction—Condition Precedent—Difference before Action brought.

A Railway Act confirming a Provisional Order, after empowering the railway company to charge a reasonable sum for certain services rendered to a trader, by way of addition to the tonnage rate, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The company having sued the respondents for services under this section, the respondents objected to the jurisdiction of the Court on the ground that the matter was one for the arbitrator to determine:—

Held, that as there had been no difference existing between the parties before action brought the arbitrator had not and the Court had jurisdiction.

The decision of the Court of Appeal, [1898] 2 Q. B. 7, reversed and the decision of Wright and Darling JJ. restored upon the above ground.

Query whether the arbitrator can determine any matter except the reasonableness of the charges.

THE appellants having brought an action in the county court at Chester against the respondents to recover 38*l.* 7*s.* for siding rents for coal wagons, the respondents gave notice to defend and defended the action on the ground that the county court had no jurisdiction to decide the matters in issue in the action, such jurisdiction being ousted by the London and North Western Railway Company (Rates and Charges) Order Confirmation Act 1891 (54 & 55 Vict. c. ccxxi.) Sched. s. 5. That section empowers the company to charge a reasonable sum, by way of addition to the tonnage rate, for certain services rendered to a trader, and proceeds thus: "Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The siding rents were for 6*d.* a day for every wagon

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not released and remaining on the company's premises after four days allowed to the respondents for unloading. The county court judge found as a fact that no difference had arisen before action brought as to the question whether the charge of 6*d.* was a reasonable one, or whether the four days was a reasonable time for unloading. The learned judge added: "The defendants knew of the charge being made against them; they accepted the services with such knowledge, though protesting against the right of the plaintiffs to make any charge; they make no complaint that the amount of the charge was unreasonable, or the period of four days, so as to enable the plaintiffs to apply to have such question settled by arbitration, nor do they take any step themselves to have the question so settled. When action is brought they say, and apparently for the first time, the question between us is as to the reasonableness of the charge of 6*d.*, and therefore for another tribunal." The judge therefore gave judgment for the plaintiffs. The defendants having appealed, the Queen's Bench Division (Wright and Darling JJ.) dismissed the appeal with costs. The Court of Appeal (A. L. Smith and Chitty L.JJ.) reversed this decision and entered judgment for the defendants. (1)

Dec. 8, 9. *Cripps Q.C.* (*C. A. Russell Q.C.* and *W. J. Noble* with him) for the appellants contended that the arbitrator had no jurisdiction under the section in a case where no difference arose before action brought; that the words "any difference arising under this section" meant any difference as to the reasonableness of the charges; that other differences must be decided by the Courts; and that the jurisdiction of the arbitrator was excluded by the findings of the county court judge.

Lawson Walton Q.C. and *Willes Chitty* for the respondents, contra.

EARL OF HALSBURY L.C. My Lords, in this case the finding of fact by the learned county court judge is upon familiar principles, and indeed by the express language of the statute which allows an appeal from the county court judge, conclusive

(1) [1898] 2 Q. B. 7.

upon any tribunal which has to decide the matter afterwards. The question which has been argued apparently before the Court of Appeal is a question no doubt of very great and serious importance both to the traders and to the railway companies; but, my Lords, so far as I am concerned, I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior Courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable. If, in the ordinary course of things, some question had arisen between the parties which they wanted to arbitrate upon, and a submission to arbitration were agreed upon in this form—which very commonly is the form—"that all matters in difference shall be submitted to A. B.," it would be a condition precedent to the arbitrator entering upon any form of inquiry there that the person who insisted that there was a difference should shew that the difference had arisen before the submission to arbitration was made. That is a matter which has been repeatedly decided, and I should think that no lawyer would hesitate to say that that is the true condition of the law. If it was sought to qualify that, I invited Mr. Chitty to argue it if he wished, because I warned him that I should give an opinion on the subject; but he has declined to argue it, and I do not wonder at it. I do not think any lawyer could reasonably contend that, when parties are referring differences to arbitration, under whatever authority that reference is made, you could for the first time introduce a new difference after the order of arbitration was made. Therefore, upon that question I certainly do give a very strong opinion.

My Lords, as to the other matter, whatever opinions I may have expressed during the course of the argument, I at present give no judgment which can be binding in any future case.

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That question, when it comes to be argued, must be argued upon the facts which raise that question; and accordingly I abstain from giving any opinion upon it. To my mind, as I have said, the condition precedent to this case coming before us was that there should have been a "difference" existing before a plaint was issued in the county court to recover for those services; and under those circumstances it appears to me that there is a finding of fact conclusive upon us by the county court judge which precludes me from giving any judgment upon the true construction of the section, except to the extent which I have pointed out. That matter, therefore, must be reserved for future consideration.

In my opinion, these proceedings have been concluded by the finding of the county court judge. From that the respondents appealed, and they succeeded in getting a judgment in their favour from the Court of Appeal. That judgment, it appears to me, was erroneous, and ought not to have been delivered, for the reasons that I have pointed out. Therefore, I think they must take the ordinary consequences of their original appeal against the order of the county court judge, and that the respondents, therefore, ought to pay to the appellants the costs of this appeal.

My Lords, I think that disposes of the whole question that we are at liberty to entertain, and I move your Lordships accordingly.

LORDS WATSON and SHAND concurred.

LORD LUDLOW. My Lords, on the present occasion I desire to express no concluded opinion with regard to the true construction of s. 5 of the Railway Act.

There is, however, one matter about which I do desire to say a word, and that is this—because I entirely concur with my noble and learned friend on the Woolsack—that this difference is a difference which ought to have arisen before action brought, and that it is too late afterwards to raise a difference which can be brought within the meaning of this section. It is sufficient for the purpose of this case to say that

it is concluded by the finding of the county court judge. As I understand that finding (and it is final), it is that there was no difference existing between the parties at the time the action was brought. I think this appeal should be allowed.

Order appealed from reversed and Order of Queen's Bench Division restored with costs here and below.

Lords' Journals, December 9, 1898.

Solicitor for appellants: *C. H. Mason.*

Solicitors for respondents: *Jaques & Co., for G. Turnbull, Bradford.*

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THE NORTH CHESHIRE AND MANCHESTER BREWERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE MANCHESTER BREWERY COMPANY, LIMITED . . . . . } RESPONDENTS.

Company—Similarity of Name—Trade Name—Deception.

The Manchester Brewery Company, Limited, had carried on business under that name for years. The appellants bought an old business called "The North Cheshire Brewery Company, Limited," and then (without intending to deceive) got themselves incorporated and registered under the name, "The North Cheshire and Manchester Brewery Company, Limited":—

Held upon the evidence that as a matter of fact the name of the appellant company was calculated to deceive and that the appellants must therefore be restrained by injunction in the usual way.

The decision of the Court of Appeal, [1898] 1 Ch. 539, affirmed.

THIS appeal turned entirely upon a question of fact. It is reported at length below. (1)

The respondents, the Manchester Brewery Company, Limited,

(1) [1898] 1 Ch. 539.

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had been established for some years and were doing a large business in Manchester, where their brewery was, and in other towns. The North Cheshire Brewery Company, Limited, had its brewery in Macclesfield and did some business in Manchester and elsewhere. In 1897 that company sold its business to a purchaser who resold to the appellants. The appellants then chose the name of "The North Cheshire and Manchester Brewery Company, Limited," and were incorporated and registered under that name. The respondents having brought an action for an injunction, Byrne J. dismissed the action with costs. The Court of Appeal (Lindley M.R., Rigby and Collins L.JJ.) reversed this decision and granted an injunction restraining the appellants "from using the name, style, or title of the North Cheshire and Manchester Brewery Company, Limited, or any other style or name which includes the plaintiff company's name, or so nearly resembles the same as to be calculated to induce the belief that the business carried on by the defendant company is the same as the business carried on by the plaintiff company, or in any way connected therewith."

Cozens-Hardy Q.C. and *Hon. C. Macnaghten Q.C.* (*Stewart Smith* with them) for the appellants.

Moulton Q.C., *Astbury Q.C.*, and *Leigh Clare* were not heard.

EARL OF HALSBURY L.C. My Lords, I do not think the learned counsel could have said more on the subject than they have, and I do not blame either of them for very fairly putting their case, such as it was, before your Lordships. I have no complaint to make of their being too long or too elaborate; but the truth is, that when one comes to see what the real question is, it is in a single sentence. Is this name so nearly resembling the name of another firm as to be likely to deceive? That is a question upon which evidence of course might be given, as to whether or not there was another brewery either in the one place or in the other, or whether there were several breweries nearly resembling it in name; what the state of the trade was, and whether there was any trade name: all those are

matters which are proper to be dealt with upon evidence; but upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason: that that is the very question which your Lordships have to decide. When I see that in the name of the appellant company there is literally and positively the same name as that of the rival company, as I will call it, and that it is only prevented from being identical in name by having another name associated with it, I should think myself that the inevitable result would be that which appears to have happened—that any one who saw the two names together would arrive at the conclusion without any doubt at all that the two companies, both with well-known names, both in the particular neighbourhood with which we are dealing, had been amalgamated. Indeed, there is a considerable body of evidence to shew that; every one who was called to give evidence on the subject, looking merely at the name, came to the conclusion at once that they had amalgamated and that the old firm no longer continued to carry on business as the old firm, but was associated with the new one under the new name. That is what all the witnesses called on that subject said. For my own part, I should not have required such evidence in these days, because it is so common a thing for companies to amalgamate that when I found two well-known names associated together as that of a new company being brought out, I should have at once jumped to the conclusion, and so would everybody else, that the two companies were really amalgamating together and forming a new company. I have not the smallest doubt that everybody who knew the two names at all would come to that conclusion.

The result to my mind is that everybody who had dealt with the old company, seeing this amalgamated name, would send their orders to the new address and not to the old address where the single company had carried on its business. That would be an ordinary business matter. If they first came to the conclusion that it was an amalgamation of the two concerns, their next proceeding would be, unless they had certain

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knowledge of the matter (and of course when you are dealing with the question of people being deceived, that negatives the idea of their having certain knowledge, or else they could not be deceived), those customers as a matter of business would direct their orders, if they intended to remain customers of the old firm, to the address of the new company which had just been brought out, which they would think included the old. Can that be permitted? I think it cannot. That is calculated to deceive, and that is the very question which your Lordships have to determine.

My Lords, it seems to me that it is not necessary to consider what the statute has done in respect of registration or the known state of the law as it existed before the statute was passed, because here it seems to me to be the same question. Here, this being a limited company, in order to have a title you must register your title, and if you register your title in such a way as is calculated to deceive, it appears to me that is the same question that the Court would have had to decide before the Act of Parliament had passed at all. Therefore, my Lords, I consider that the Court of Appeal were perfectly right in trying this by the test of the statute, although it was not necessary to invoke the statute at all. The result seems to be beyond doubt that the judgment of the Court of Appeal was perfectly right, and ought to be affirmed, and that this appeal ought to be dismissed with costs.

I think it right, however, to say that I adopt the view of Byrne J. in respect of the perfect innocence of these parties in the selection of the title that they chose. I do not impute either fraud, or what indeed would be something more than the original fraud, if I were to hesitate to accept their evidence because they pledged their oaths to it, and I see no reason to disbelieve what they said. Byrne J. was perfectly right in accepting as true what they said. I can quite understand that they are interested, whatever may be the result of this appeal, in preserving, at all events for the sake of their own character and position, the proposition laid down by Byrne J. I do not conceal from myself that there are passages in the judgment of Rigby L.J. which seem to throw doubt upon that; but the rest

of the Court of Appeal did not quite concur with him in that, and I do not concur with him. It seems to me we ought frankly to accept the statement of the learned judge who heard the witnesses and had the best opportunity of determining whether they were speaking accurately or not; and therefore I add the same proposition as part of my judgment because I think they are entitled to have that said of them by the ultimate Court of Appeal. In the result it is perfectly immaterial to my mind, for the purpose of the decision of this case, whether they were fraudulent or not. The question is whether this is an injury to the plaintiffs' right. If it is an injury to the plaintiffs' right, it is perfectly immaterial whether they intended it or not. The Court must restrain them from that which is injuring another person, however inadvertently or innocently they may have done it.

Under those circumstances, I move your Lordships that the Order appealed from be affirmed, and this appeal dismissed with costs.

LORD WATSON. My Lords, in this case the appellant company is starting a new concern, and they have adopted for their title and have registered a name under which they propose to trade which incorporates with other titles the name of the respondent company.

This action arises before there is any room for testing by evidence whether or not the procedure of the appellants will necessarily lead to the results which are apprehended by the respondent company. I do not think it necessary on a question of injunction to inquire into that matter. What appears to me to be perfectly plain is this—that in the meantime the respondent company are exposed to every possible inconvenience which can arise to their trade from the fact of a rival company starting afresh in the same trade in the same locality, and under substantially the same name with themselves. I think the appellant company, although I free them from any imputation of a fraudulent intent, have acted in a way which is to the possible if not probable detriment of their neighbours, and in a manner that is in law unjustifiable. They have trenched upon the

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private rights of their neighbours, and I think that the Court of Appeal have done right in recalling the judgment of Byrne J., and in granting an injunction in the terms craved.

LORD SHAND. My Lords, I assume, as your Lordships have done, for the decision of the question which has arisen, that the appellants did not adopt the use of the name "The Manchester Brewery Company" with a desire to take the title of another company, and thereby to gain an advantage. I feel, as your Lordships do, that the finding of Byrne J. on that point, he having seen the witnesses and heard the evidence orally, is entitled to great weight. Undoubtedly he had great advantages in the consideration of that question. I further agree that it is not necessary in a case of this kind that an improper motive or a fraudulent intention should be made out. Here the simple question to be decided is, assuming bona fides on the part of the appellants, whether or not the use of this particular name is calculated to injure another firm which had been using that same name, I believe for a period of about eight years. Whether the question arises under statute or under the common law, the issue which the Court or this House has to decide appears to me to be the same. Was the taking of the name of "The Manchester Brewery Company, Limited," calculated to induce the belief amongst the public or the trade that the business which was carried on by the respondents is now the business carried on by the new firm?

My Lords, I have looked at the case with all the more anxiety because we have before us a very careful and well-considered judgment by Byrne J. In dealing with the case he has presented in clear and powerful language all the considerations that can be adduced on behalf of the appellants for the decision of the question; but, giving every weight to the judgment of that learned judge, I am unable to agree with him in his result, for I concur with the Master of the Rolls in what he says in a passage of his judgment with reference to the impression that any one would form on seeing this title and having the knowledge of the existence of these companies: "his idea would be that those two companies had combined together,

and that the Manchester Brewery Company had ceased to carry on business as a separate company."

I agree with your Lordships in thinking that the question for the decision of the Court is not a question of law, but a jury question, in deciding which the Court has to look at the whole of the surrounding circumstances. Cases differ so much one from another that the decision of one case cannot, in my view, materially assist in the decision of another.

[His Lordship then discussed the evidence, and came to the conclusion of fact above expressed.]

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 13, 1898.

Solicitors for appellants: *Firth & Co., for Godfrey, Rhodes & Evans, Halifax.*

Solicitors for respondents: *Chester, Broome & Griffiths, for Farrar & Co., Manchester.*

[PRIVY COUNCIL.]

J. C.* 1898 July 12, 14; Nov. 26.

COLLESS . . . . . APPELLANT;

AND

THE MINISTER FOR LANDS . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Lands Acts—Resumed Area—Leasehold Area—Crown Lands Act, 1895, *ss.* 5, 11.

Under s. 5 of the Crown Lands Act, 1895, leasehold area becomes resumed area after notification to that effect in the *Gazette*. A grant to a tenant on the expiry of his lease of a preferential occupation licence in regard to his holding does not under the Crown Lands Acts change its character to that of a resumed area. Nor does a *Gazette* announcement of such licence operate as a notice that the area affected has been resumed:—

Held, accordingly, that the appellant had no title to apply before notification under s. 5 for a conditional lease of land held under a licence; and that s. 11 of the same Act (which only saves existing rights) did not avail him.

APPEAL from a decision of the Supreme Court (June 30, 1897) on a special case stated by the Land Court under s. 8, sub-s. 6, of the Crown Lands Act of 1889.

The main question decided in the appeal, which is involved in the questions submitted by the special case and set out in their Lordships' judgment, was whether the land applied for by the appellant as a conditional lease was within leasehold area or resumed area as those terms are interpreted by the Crown Lands Acts.

Under the Act of 1884 each of the old pastoral holdings or runs became divided into two equal parts: one, called therein resumed area, was to be available for conditional purchase or lease thereunder; the other, called leasehold area, was by s. 21, sub-s. 3, of the Act of 1884, and s. 10 of the Act of 1889, exempted from such purchase or lease. By the Act of 1884 a leasehold area, on the expiry of the first pastoral lease, might

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(s. 79) either be relet on pastoral lease or declared a resumed area. By the Act of 1889, s. 79 was in effect repealed, and with regard to leasehold areas in the Central Division, including the area in this case, the lessee became entitled to a preferential occupation licence (s. 43), failing which such area became vacant land, which is distinct (see s. 81 of the Act of 1884) from resumed area. The Act of 1895 (s. 4) made further provisions for the granting of preferential occupation licences of leasehold area in the Central Division to the existing tenants upon the determination of the pastoral lease; s. 5 providing that, on expiry of a pastoral lease, leasehold area in the Central Division should become resumed area on notification in the *Gazette* to that effect. Sects. 24 and 25 of that Act introduced settlement leases for agricultural and grazing farms, the Crown being authorized by s. 10 to set apart by notification in the *Gazette* areas the Crown lands within which were to be available only for settlement leases, with a proviso in s. 11 that existing conditional purchasers should not be prevented from applying within forty days for any lands in the said areas which they otherwise might have applied for within that time.

On January 23, 1896, the appellant applied for a conditional lease of 1920 acres, part of a measured farm of 2413 acres in the Central Division which the Government had notified to be set apart for settlement leases, specifying January 30, 1896, as the date when such leases might be applied for. The farm was part of a leasehold area the pastoral lease of which had expired on July 10, 1895. It was held by the late pastoral lessee under preferential occupation licence. Two days after January 23 it was notified as resumed area.

The Local Land Board on May 21, 1896, disallowed the appellant's application, finding that the land applied for by him was not available. On appeal to the Land Court, a special case was stated for decision by the Supreme Court on the request of the Minister. On June 30, 1897, the Supreme Court upon argument held that the land applied for was not available for the purposes of that application when made, and that the said application under the circumstances in the special case mentioned was not a valid application, nor did it constitute a

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continuing offer capable of subsequent acceptance, and gave judgment accordingly.

Bosanquet, Q.C., and *Gurner*, for the appellant, contended that on the true construction of the Crown Lands Acts, 1884, 1889, and 1895, the land in question was, on January 23, 1896, the date of the appellant's application, a resumed area within s. 5 of the Act of 1895. Notification in the *Gazette* was not essential to the alteration of tenure from that of leasehold to that of resumed area. The land had ceased to be within a leasehold area on the expiry of the pastoral lease. A preferential occupation licence had been granted thereof, but that did not constitute it leasehold land, nor was it vacant land. The only other alternative is that it was, in truth, resumed land, having been set aside by the Government on December 18, 1895, for settlement leases, though the formal notification to the effect that it was resumed had not been made. That, it was contended, was the true inference to be drawn from the notification of December 18, 1895, as well as from two earlier notifications of July 4 and October 1, 1895. If the notification in the *Gazette* expressly under s. 5 was the point of time at which and not before which that result accrued, it would give the Governor power to defeat the impartial intentions of the Legislature and to give priority to individuals at his pleasure. The appellant's application was duly lodged under s. 11 of the Act of 1895, and constituted a continuing offer capable of subsequent acceptance: see *Ricketson* v. *Barbour*. (1) So far as the notification of January 25, 1896, tended to defeat the appellant's application and his rights under s. 11, it was of no legal effect.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the respondent, contended that on January 23, 1896, the land in question was leasehold area. Sect. 5 of the Act of 1895 differs from s. 33 of the Act of 1889. The latter provided that on the expiry of pastoral leases the lands comprised in them should become resumed areas; the former provided that that result should happen on notification to that effect in the *Gazette*, and not before. In other words, under s. 5 leasehold area is not

(1) [1893] A. C. 194.

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available for conditional sale or letting until the Government so determines. Sects. 10 and 11 of the Act of 1895 do not avail the appellant. The proviso in the latter section does not confer on conditional purchasers a right to have leasehold areas thrown open to them which were not already so open.

An application for a conditional lease or purchase at a time when the land is not available for that purpose is invalid and nugatory: see *Minister of Lands* v. *Bolton*. (1) Such application is not a mere offer, but is a statutory proceeding which, if valid, vests in the applicant a title to the land from the date of the application. It also withdraws it from any existing occupation, licence, or annual lease: see the Act of 1889, s. 12, sub-s. 1. The appellant's application, being invalid when made, could not be deemed to have been made at any subsequent date. If entitled to forty days' grace, under s. 11 of the Act of 1895, from the notification of December 18, 1895, that grace expired on January 27, 1896, and the next office day after January 23 was January 30. Under the Act the Governor had power to fix the time when leasehold area should cease to be such, and therefore the date on which the appellant, who has no right except so far as he can bring himself within the letter of the Act, could make a valid application.

Bosanquet, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON. The appellant, Mr. Colless, on March 7, 1895, made an application for an original conditional purchase of 640 acres of Crown land in the Central Division of the Colony of New South Wales, which was duly confirmed by the Local Land Board on May 27, 1895. The land thus conditionally purchased was adjacent to the pastoral holding of "Come-by-Chance," and "Jim along Josey," within the same division of the Colony, which holding, in pursuance of the provisions of Part IV. of the Crown Lands Act, 1884, was divided into two parts, and the area contained in one of these parts was notified as the leasehold area of the pastoral holding.

The tenant of the pastoral holding did not make any

(1) [1896] 17 N. S. W. R. (C. L.) 389.

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application for the renewal or extension of his tenure, which expired on July 10, 1895; but he obtained from the Crown a preferential occupation licence, in virtue of which he continued to occupy the land after the termination of his lease. After the lease expired, the lands which had been included in it were measured and subdivided into farms to be let under settlement lease, one of these farms comprising an area of 2413 acres.

On December 18, 1895, a notification by the Governor with the advice of his Executive Council was published in the *Gazette*, to the effect that the lands comprised within certain farms therein specified, including the leasehold area of "Come-by-Chance" and "Jim along Josey" holding, "are hereby set apart for settlement leases." It was also notified that, under the provision of ss. 24 and 25 of the Crown Lands Act, 1895, these farms would be available for settlement lease on and after January 30, 1896. On January 25, 1896, another notification by the Governor and his Council relating to the same lands was published in the *Gazette*, to the effect that, in pursuance of s. 5 of the Crown Lands Act, 1895, these lands "are now resumed areas, and have ceased to be leasehold areas within the meaning of the Crown Lands Acts."

On January 23, 1896, the appellant presented an application for a conditional lease of 1920 acres in virtue of his aforesaid original conditional purchase. The lands so applied for formed part of the 2413 acres already mentioned, which had been included in the pastoral lease, and had been possessed since its expiry under a preferential occupation licence.

On January 31, 1896, Joseph Manasseh Gordon made application for a settlement lease of the said farm or area of 2413 acres.

The Crown lands agent, in order to determine the priority of the applications made by the appellant and by Joseph Manasseh Gordon, resorted to a ballot, the result of which was that Gordon's application came out first.

The Local Land Board on May 21, 1896, confirmed Gordon's application for a settlement lease, and disallowed the appellant's application upon the ground that, at the time when it was presented, the land which he applied for was not available for a

conditional lease. On appeal against that decision, the Land Court differed in opinion from the Local Land Board, and stated a case, in terms of s. 8 (vi.) of the Crown Lands Act, 1889, in which the following questions were submitted for the decision of the Supreme Court:—

(1.) Whether the land applied for by Harold Edward Colless as a conditional lease on the 23rd day of January, 1896, was available for the purposes of that application when made?

(2.) Whether the said application lodged under the circumstances hereinbefore set forth was a valid application, and constituted a continuing offer capable of subsequent acceptance?

(3.) Whether, if question 2 is answered in the affirmative, the said application was entitled to priority over the application of Joseph Manasseh Gordon?

The case was heard on June 30, 1897, before the Appeal Court, consisting of Darley C.J., with Manning and Simpson JJ. The learned judges, whose reasons were delivered by Manning J., unanimously answered the first and second questions in the negative, which rendered it unnecessary to make any reply to the third; and they therefore allowed the appeal, with costs, and directed that the decision of the Local Land Board should be restored.

In the argument upon this appeal, it was not disputed, on either side of the Bar, that, if the lands in question formed part of a resumed area on January 23, 1896, they were open to the application made by the appellant of that date for a conditional lease. By s. 4 of the principal Act of 1884, "resumed area" is defined to mean "that portion of a pastoral holding for which a pastoral lease may not be granted under this Act"; and the definition is incorporated with s. 2 of the Act of 1895. On the other hand, the appellant's counsel did not dispute that a conditional lease of the lands in question could not competently be granted so long as these lands remained, as they admittedly had been until July 10, 1895, portions of a leasehold area. Accordingly, a great portion of the appellant's argument was directed to establishing that, at and prior to January 23,

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1896, the lands for which he then made application had ceased to be leasehold area, and had become resumed area, within the meaning of the Acts. On the assumption that they had not, it was alternatively maintained, though not with the same vigour which characterised the rest of the argument, that the appellant's application of January 23, 1896, did notwithstanding continue to be operative, and preferably affected the lands as soon as they were declared to be resumed area and ceased to be leasehold.

It appears to their Lordships that the provisions of the Act of 1895 are fatal to the leading contention of the appellant. Sect. 5 enacts that "after the expiration of the term or extended term of a pastoral lease in the Central Division, the lands theretofore subject to such lease shall become a resumed area on notification in the *Gazette* to that effect, and on such notification, and not before, shall cease to be a leasehold area within the meaning of the principal Act." Counsel for the appellant were therefore constrained to argue that the provisions of s. 5 did not apply, and that leasehold area became resumed area within the meaning of the Acts whenever the Crown, on the expiry of his lease, gave to the previous tenant a preferential occupation licence to enable him to continue his possession. Their Lordships are unable to find anything in the context of the Land Acts which could warrant them in sustaining such an implied exception from the provisions of s. 5, which are in themselves absolute and unqualified. They are accordingly of opinion that, under the express enactments of that clause, the lands in question continued to be leasehold area until they were declared to be resumed area by the *Gazette* notification of January 25, 1896.

It may here be noticed that the appellant founded upon two announcements which appeared in the Government *Gazette* of July 4, 1895, and of October 1, 1895, respectively, as being equivalent in effect to notifications that the lands in question had been "resumed" of these dates. Neither of these announcements is in the nature of a notification such as is required by s. 5 of the Act of 1895, which must emanate from the Governor and his Council. The first of them is a

notice by the local officer that preferential occupation licences had been granted for certain "leasehold areas in the Central Division," including the lands now in question, which, so far as it goes, involves the assertion that the lands demised by these occupation licences were leasehold area. The second of them is a simple notice by the same official that the fees payable in respect of such licences were of the amounts stated in a schedule appended to the notice, and must be paid to the Colonial Treasurer within a time limited. Beyond shewing the fact, which is otherwise apparent and is not disputed, that a preferential licence had been granted to occupy the area in question, both intimations are immaterial. They could not have the effect of altering the purposes to which the area was at the time legally appropriated.

It is also necessary to notice the argument which was addressed to their Lordships for the appellant, founded upon the terms of s. 11 of the Act of 1895, with respect to conditional purchases and conditional leases in classified areas. The preceding section (10) gives the Governor absolute discretion to classify Crown lands, and declares that, when such classification has been duly notified in the *Gazette*, the lands comprised in it shall not be available for any other application than that which it sanctions. Had these provisions been unqualified, it is obvious that the Governor and his Council might have destroyed the privilege of a person who was in a position to apply for a conditional purchase or lease, by notifying in the *Gazette* a new classification which excluded conditional purchase and leases. Sect. 11 is a saving clause, which in that case preserves the privilege upon certain conditions, one of which is that the holder of the privilege shall make his application for conditional purchase or conditional lease not later than forty days after the date of the notification that a new classification has been made. Although the clause to that extent, and under these conditions, saves existing rights, it creates no new right or privilege; and, in their Lordships' opinion, its provisions cannot avail any person who was not, before and at the date of the notification, in a position to apply for a conditional purchase or lease.

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The result of the opinions already expressed by their Lordships is that the appellant, on January 23, 1896, had no title to apply for a conditional lease of the area in question, which was then, and previously had been, appropriated to purposes which excluded any such application. Their Lordships do not think it necessary to discuss the plea urged by the appellant, to the effect that, assuming his application to have been incompetently made on January 23, it became operative as soon as the notification of January 25, 1896, took effect. Upon that point they agree with the learned judges of the Court below. They will accordingly humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Solicitors for appellant: *McKenna & Co.*
Solicitors for respondent: *Light & Galbraith.*

[PRIVY COUNCIL.]

DILWORTH AND OTHERS . . . . . DEFENDANTS; J. C.* 1898 July 6, 7; Nov. 26.

AND

THE COMMISSIONER OF STAMPS . PLAINTIFF.

DILWORTH AND OTHERS . . . . . DEFENDANTS;

AND

THE COMMISSIONER FOR LAND AND INCOME TAX . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Charitable Trusts—Exemption from Duty—Charitable Gifts Duties Exemption Act, 1883, *ss.* 2, 3—*Land and Income Assessment Act*, 1891, *s.* 16, *sub-s.* 1—*Amendment Act*, 1892, *s.* 3, *sub-s.* 4—*Construction.*

Held, that a gift by will, for the maintenance and education of boys who are orphans or the sons of parents in straitened circumstances, is "charitable" within the meaning of the New Zealand Exemption Act, 1883, s. 3; notwithstanding that the educational institute to be formed is directed to be managed by the members, and its inmates to be instructed in the tenets, of a particular religious sect:

Held, also, that the institute, being an educational endowment in perpetuity vested in trustees without personal interest therein, the whole beneficial interest belonging exclusively and inalienably to the public, is a public institution within the meaning of s. 2:

Held, further, that the income derivable under the gift is exempt from taxation by s. 16, sub-s. 1, of the Land and Income Assessment Act, 1891, and by s. 3 of the amending Act of 1893 read therewith.

Two appeals from two judgments of the Court of Appeal dated April 27, 1896, and October 29, 1896.

The judgment in the first appeal decided, on a case stated by the respondent at the request of the appellants, that a bequest to a charity called "The Dilworth Ulster Institute," made by the will of James Dilworth, is not exempt from the payment of duty chargeable under the Deceased Persons' Estates Duties Act, 1881, and its amendments, and that the appellants,

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the executors of the said will, are not entitled to any refund of duty in respect of the assessment of the estate of the said James Dilworth.

The judgment in the second appeal decided, on a special case stated in an action brought by the respondent to recover land tax on the lands vested in the appellants as trustees for the said institute, that the respondent was entitled to recover notwithstanding the exemptions contained in s. 16 of the Land and Income Assessment Act, 1891.

The facts stated in the cases and the points submitted for the decision of the Court are set out in their Lordships' judgment.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appellants in both appeals, contended that the devise in question was charitable both in the legal and also in the common and popular sense, within the meaning of s. 3 of the Charitable Gifts Duties Exemption Act, 1883. See *Dolan* v. *Macdermot* (1); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2); *Clark* v. *Taylor* (3); *Attorney-General* v. *Pearce*. (4) The expression "charitable devise and bequest" in s. 3 is not limited on its true construction to devises and bequests to public institutions as mentioned or described in the interpretation clause (s. 2). Even if it were so limited, the institute in question in this case is an institution within the terms of that section. Further, it was contended that the lands devised vested in the appellants as trustees for the institute were so vested in them for public charitable purposes within the meaning of Land and Income Assessment Act, 1891, s. 16, sub-s. 1, and that there was nothing in any of the sub-paragraphs of that sub-section or in Amendment Act, 1892, s. 3, sub-s. 4, inconsistent with the construction contended for.

Haldane Q.C., and *Rowden*, for the respondent in both cases, contended that ss. 2 and 3 of the Act of 1883, cited on the other side, must be read together, and that according to their true construction the charitable devises and bequests referred to

(1) (1868) L. R. 3 Ch. 676.
(2) [1891] A. C. 531, 588, 589.
(3) (1853) 1 Drew. 642.
(4) (1740) 2 Atk. 87.

in s. 3 are restricted to those in favour of public institutions specified in s. 2. Accordingly, s. 3 has no wider effect than s. 2. Read together, the charitable bequests therein mentioned do not include all objects which have been held to be charitable within the provisions of 43 Eliz. c. 4, but are confined to public charities in the popular sense. Besides, the institute in question was established for the benefit of a sect or class, and is not a public school or benevolent asylum within s. 2, nor a public institution of any of the kinds specified therein. Regard must be had to the power of selection given to the trustees in respect of the recipients of the benefits of the devise, and to other restrictive conditions in the will. The charity was not necessarily for the benefit of the inhabitants of New Zealand, and accordingly was not in advancement of a public institution within the meaning of the local statute. As regards the second appeal there was this further consideration—that no building had yet been erected for the purpose of the charity on the lands in question which were not yet used or occupied within the meaning of s. 16, sub-s. 1, clause (*g*), of the Act of 1891. The exemptions in that Act only include lands actually occupied for a public purpose, and do not include lands in the nature of endowments.

Cozens-Hardy, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON. The appellants in both these cases are the testamentary trustees and executors of the late James Dilworth, of Remuera, near Auckland, in the Colony of New Zealand, who died on December 23, 1894. Before the commencement of either of the suits in which these appeals are taken, the appellants had obtained probate and had carried out the whole directions of the testator, with the single exception of his instructions with regard to disposal of the residue of his estate, real and personal.

The testator, after making due provision for all persons whom he conceived to have a moral claim upon him, declared his intention of establishing an institution, to be called the Dilworth Ulster Institute, with the object of affording to boys

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of the classes thereinafter mentioned such maintenance, education, and training as would enable them to become good and useful members of society; and for that purpose he bequeathed to the appellants the whole of the residue of his real and personal estate which he had power to dispose of by will. At the time of the testator's death, the residue of his trust estate, both real and personal, was certified by the Commissioner of Stamps to be of the value of 100,655*l.* 2*s.* 3*d.*

The testator directed the appellants to reserve not less than twenty-five acres of his land at Remuera, known as Graham's Hill, for the purpose of erecting suitable buildings for the Dilworth Ulster Institute; and also, in the event of their resolving to establish an industrial branch of the institute at Waitakerei, to reserve sufficient land for that purpose. Instructions were given to the appellants that, in order to prevent the net income derivable from the residue falling below the sum of 5000*l.* per annum, they should accumulate and invest such sum of money as they might think necessary before proceeding to erect any buildings for the purposes of the institute. And they were directed that, whenever the net income of the residue amounted to not less than 5000*l.* per annum, and the money in their hands amounted to not less than 10,000*l.* over and above any sums which they had invested for the purpose of securing the net income of 5000*l.*, they should proceed to erect a substantial building upon the testator's lands at Auckland known as Graham's Hill.

The testator further directed that, as soon as the buildings at Auckland were completed, and all liabilities incurred in the erection thereof discharged, the appellants should select so many boys of sound bodily and mental health, being orphans or sons of persons of good character and of any race, as in the opinion of the appellants that portion of the income available for the purpose will be sufficient from time to time to support, train, and educate. All boys selected must be either destitute orphans or the children of persons in straitened circumstances resident in the provincial district of Auckland or in the province of Ulster in Ireland; and, ceteris paribus, a preference is to be given to boys resident in or near the town of Dungannon in

the province of Ulster. Boys selected from the provincial district of Auckland must not be under three nor above five years of age, and those selected in the province of Ulster must be between five and eight years of age. The Ulster boys are to be selected by the minister for the time being of a church in Dungannon in connection with the General Synod of the Anglican Church called the Church of Ireland, and failing his nomination by the appellants themselves. Provision is made for supplying the Ulster boys with an outfit, and forwarding them to the Dilworth Ulster Institute at Auckland. No pupil is to remain in the institute after he has attained the age of fifteen, but, in the case of pupils distinguished by their industry and natural talents, the appellants are empowered to make arrangements for their maintenance and the prosecution of their studies at any university in New Zealand, or in Dublin, or in or near the city of Belfast in Ireland, and to allow such pupils in the meantime to remain resident in the institute.

All boys selected as pupils of the institute are to be maintained in the buildings of the institute, are to be clothed in a suitable uniform dress, are to be brought up and educated in the tenets of the Church of the Province of New Zealand, commonly called the Church of England, and are to be instructed in such branches of learning and industry as shall be considered likely to make them good and useful members of society. It is expressly declared that no person shall be appointed chaplain, secretary, master, teacher, or other officer of the institute, until he shall have signed a declaration that he is a member of the Church of the Province of New Zealand commonly called the Church of England, and that he accepts and maintains the principles of the Reformation accomplished in the Church of England in the sixteenth century of the Christian era.

The appellants have hitherto been accumulating the income of the residue, in accordance with the directions of the testator: and they have not yet commenced to erect the buildings of the Dilworth Ulster Institute.

So far as hitherto stated, the facts are common to both

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appeals; but the questions raised by these appeals depend upon the construction of different Acts of the Legislature of New Zealand, and must now be separately considered.

FIRST APPEAL.

Under the provisions of the Deceased Persons Estates Duties Act, 1881, the Commissioner of Stamps for the Colony, who is the respondent in this appeal, assessed the death duty payable by the appellants in respect of the residue of the testator's estate at the sum of 12,735*l.* 13*s.* 6*d.* The appellants declined to pay upon the ground that they were exempted from liability by the Charitable Gifts Duties Exemption Act, 1883; but the respondent held that they were not entitled to exemption, inasmuch as the bequest to the Ulster Institute is a gift to a sect or class, and is not a devise or bequest to a public institution, or a charitable bequest within the meaning of the Act. A case was accordingly prepared for the opinion of the Supreme Court of the Colony. The questions submitted to the Court were:—

I. Is the bequest to the Dilworth Ulster Institute so made as aforesaid exempt from the payment of duty chargeable under the Deceased Persons Estates Duties Act, 1881, and its amendments?

II. What refund of duty (if any) are the said executors entitled to demand in respect of said assessment?

The case was first heard before Connolly J., who, on December 18, 1895, answered both these questions in the negative. On April 27, 1896, his judgment was affirmed by the Court of Appeal, who unanimously held that the testator's bequest of residue did not come within the exemption provided by the Act of 1883.

The controversy between the parties turns upon the construction of two clauses in the Charitable Gifts Duties Exemption Act, 1883, which are in these terms:—

Sect. 2. "In this Act, the term 'charitable purposes' includes devises, bequests, and legacies of real or personal property respectively of whatever description to public institutions such as libraries, museums, institutions for the promotion of

science and art, colleges and schools, or to hospitals, orphan, lunatic, or benevolent asylums, dispensaries."

Sect. 3. "Notwithstanding anything contained in the Deceased Persons Estates Duties Act, 1881, or in any other Act of a like character, no duty whatsoever shall be payable in respect of any charitable devise or bequest."

These two clauses form the substance of the exempting Act of 1883, which contains only four sections. Sect. 1 relates to the short title of the Act, and s. 4 to the date on and after which its provisions were to be operative.

Sect. 3, which enacts exemption from the duty imposed by the Deceased Persons Estates Act, 1881, or by any Act of a like character, is expressed in very wide and general terms. It provides that no duty whatsoever shall be payable "in respect of any charitable devise or bequest." The only test of immunity required by that enactment, when considered per se, is that the devise or bequest shall be of a "charitable" nature. It does not appear to their Lordships to admit of reasonable doubt that the gift of residue to the Ulster Institute is charitable, in the popular sense of that word. It provides for the maintenance and education of boys who are orphans, or the sons of parents who are in straitened circumstances; and it does not, in their Lordships' opinion, derogate from the charitable nature of the gift that the institution is to be managed by persons of a particular religious persuasion, or that its inmates are to be instructed in the tenets of the same sect. But, in the argument addressed to their Lordships, a question was raised in regard to the true legal construction of s. 2, and to what extent, if any, its provisions qualify the enactments of the succeeding clause.

Sect. 2 is, beyond all question, an interpretation clause, and must have been intended by the Legislature to be taken into account in construing the expression "charitable devise or bequest," as it occurs in s. 3. It is not said in terms that "charitable bequest" shall mean one or other of the things which are enumerated, but that it shall "include" them. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring

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in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

Their Lordships have come to the conclusion that it is not necessary for the decision of this appeal to determine in which of these senses the word "include" is used in s. 2. They are willing to assume, and will accordingly assume, that the word was meant to introduce an exhaustive definition, and that the provisions of that clause must govern the meaning of the words "any charitable devise or bequest" which are the subjects of direct exemption in s. 3. The objects defined in s. 2 are charitable in the legal sense of the word; but they do not comprehend all of the objects which would naturally fall under the general definition of "charitable."

Upon the assumption now made, the crucial question in this appeal comes to be—whether the gift of residue to the Ulster Institute is a charitable bequest within the meaning of the 2nd clause of the Act of 1883.

The 2nd clause enumerates two classes of institutions, a legacy or devise of real or personal property in whose favour will constitute a charitable bequest, not chargeable under the Death Duties Act of 1881. The first class of objects must be of a public and not a private character, and consist of "public institutions such as libraries, museums, institutions for the promotion of science and art, colleges and schools." The second class of objects is introduced by the alternative "or," and consists of "hospitals, orphan, lunatic, or benevolent asylums, dispensaries." The word "public," which characterises all the

objects of the first class, is not repeated in or connected with the second class; and it appears to their Lordships that it was not meant to apply to any of the objects enumerated in that class.

In considering whether the Ulster Institute is within the second class of objects enumerated in s. 2, their Lordships therefore think it is immaterial whether the institution, when duly completed and administered according to the testator's directions, will be public or private. One thing is tolerably certain—that it will not be a dispensary, the main purpose of which is the distribution of medicine. "Hospital" is a word of wider and more variable meaning, and primarily signifies a place built for the reception of the sick or the support of the aged or infirm poor. It has been used in Great Britain, in some instances, to denote an institution in which poor children are fed and educated. But that is not the ordinary meaning of the word; and in the present case it is necessary to compare it with the other expressions which occur in s. 2. "Schools" are enumerated in the first class; and if it were plain that the Ulster Institute, when in operation, will be a public school, there would be an end of the present question. On the other hand, if the institute will be a private school, and is so excluded from the first class, there can, in their Lordships' opinion, be no presumption that it was meant to be included in the second class under the general description of an hospital. It would, in their opinion, require more definite language in order to produce that result. The word "asylum," which is the only other term of importance occurring in the second enumeration, is qualified by the expressions, which are used as adjectives, "orphan, lunatic, or benevolent." The word "asylum," according to its original derivation and in its widest meaning, simply signifies a refuge—a place of retreat and security. In its English acceptation, the word is most commonly used to denote an establishment for the detention and cure of persons suffering from mental disease, and also a place for the reception and up-bringing of destitute orphans. Although the word might be loosely applied to a night refuge for the homeless, or to any similar institution, there does not seem to be any warrant for describing the Ulster Institute as a

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"benevolent asylum." Then the institute has no relation to the insane; and the benefits which it confers are not confined to the children of deceased parents. The fact that some of its inmates are to be orphans will not impart to the institution generally the character of an orphan asylum.

It does not appear to their Lordships to admit of doubt that the Ulster Institute is in its essential character a school for the education of boys between the ages of three and fifteen, and that it must, at all events, be regarded as an institution of a similar nature to a college or school. But the right to exemption from death duty depends, in their view, upon the institute being a "public" institution within the meaning of the first branch of the enumeration in s. 2. It was plainly the intention of the Legislature to exclude from the benefit of the exemption bequests to scholastic institutions which are not public, or, in other words, which are of a private character; but the context of the Act does not define, and affords no means of determining what, according to the general understanding of the Colony, constitutes the essential difference between a public and a private school. As these words are used in England, there would be no difficulty in pointing out some schools which are public, and others which are unmistakably private; but it might be troublesome to explain the reason why some schools are called public, whilst others, not very different in their character and circumstances, are known as private. It is in regard to the latter class that the difficulty arises of correct description, such as occurs here.

Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals for their own emolument are as clearly private. All schools, whether public or private in the strictest sense of the words, which have a reasonably large attendance of scholars have one feature in common. They give instruction to the public, or, in other words, to the children of different sections of the public; and the character of the school, as public or private, must depend, not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given.

The Ulster Institute is designed to give free maintenance, clothing, and education to the children of a certain section of the public whose parents are resident in the Colony of New Zealand. In their Lordships' opinion the character of the institution is not materially altered either by the circumstance that the remainder of the beneficiaries are to be selected in another country, and thence conveyed to the institute at Auckland, or by the circumstance that all of the beneficiaries are to be educated according to the religious tenets of a particular Church. If the institute be, within the meaning of the Act of 1883, a public institution such as a school, there is no provision in that Act which can deprive it of the benefit of the exemption, in respect of either of these circumstances.

Their Lordships have come to the conclusion, not without hesitation, owing to the view taken by the Courts below, that the Ulster Institute, as designed by its founder, does answer the description of a public institution such as a school. It appears to them that, if the testator had directed his trustees forthwith to hand over the administration and management of the Ulster Institute to a public body in New Zealand, or if he had made his bequest directly to such public body for the same purposes, the institute would necessarily have been regarded as a public and not as a private institution. What he has directed to be done is in substance the same thing. His trustees, to whom he has delegated the duty of building the institute and of superintending its administration, are his trustees in this sense only—that he appointed them. They have no personal interest in the residue, which they hold only for behoof of those children, members of the public, whom he has directed them from time to time to select as the beneficiaries under the trust. The bequest is an educational endowment in perpetuity, and the beneficial interest in it is not vested in any private person, but belongs inalienably to the public. Such being the character of the charity founded by the testator, their Lordships do not think that the inmates of the Dilworth Ulster Institute could with propriety be described as the recipients of private education.

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SECOND APPEAL.

In this case, the appellants complain of an assessment of 557*l.* 9*s.* 8*d.* imposed by the respondent, who is Commissioner of the Colony for Land and Income Tax, upon the income and profits of the land and personalty forming the residue of the testator's estate during the year 1895-96. The assessment was made under the Land and Income Assessment Act, 1891, which repealed the provisions of the Property Assessment Act, 1885, and it was objected to by the appellants upon the ground that the income derived by them from the residue was expressly exempted from duty by s. 16 of the Act of 1891. The respondent disallowed the objection; and a special case was stated by the parties for the opinion of the Court of Appeal, in which the only question submitted was, in substance: Whether the appellants, as trustees of Mr. Dilworth's will, are liable to pay to the respondent "land tax upon the lands vested in them as aforesaid"? The case does not raise any question as to income arising from estate other than lands. It was heard before the Court of Appeal, who, on October 29, 1896, unanimously answered the question submitted to them in the affirmative, and gave the respondent judgment for the amount of duty which he claimed.

In the case lodged by them with a view to this appeal, the appellants rely upon a clause in the Land and Income Assessment Act Amendment Act, 1892, creating additional exemption, which is in the following terms: "Sect. 3, sub-s. 4. All mortgages held and all income received or derived by or on behalf of any public charitable institution whether formed under the Hospitals and Charitable Institutions Act, 1885, or any other Act for the time being in force, or howsoever formed, if carried on for any public charitable purpose, and not for any gain or profit." Their Lordships are of opinion that these provisions, whatever be their effect, must be taken into account in construing the principal Act of 1891; because the assessment in question was imposed in virtue of that Act, as amended by the statute of 1892.

The enactments with respect to exemption from duty, in so

far as they have any bearing upon the present case, are contained in sub-s. 1 of s. 16 of the principal Act, which is in these terms:—

"16. Land owned and income derived or received, as hereinafter mentioned, shall be exempt from taxation under this Act, subject, however, to the provisions hereof:—

"(1.) All land owned by any person or body corporate or unincorporate, and used or occupied by such person or body solely for any of the purposes hereinafter mentioned:—

"(*a*) A place of worship or a place of residence for the clergy or ministers of any religious body.

"(*b*) Any public school established under the Education Act, 1877, and all lands and buildings used for any school which is not carried on exclusively for pecuniary gain or profit, but so that not more than fifteen acres be used or occupied for the purposes of any one such school.

"(*c*) The site of any university, or college or school, incorporate by any Act or Ordinance, or the site of a public library, athenæum, or mechanics institute, or any public museum, or any school of mines.

"(*d*) A public cemetery or burial ground.

"(*e*) The ground or place of meeting for any agricultural society being the property of the society.

"(*f*) A place of meeting for the purposes of a friendly society, or of a masonic lodge, or of any building society registered under the Acts in force relating to building societies.

"(*g*) Public charitable institutions constituted under the Hospitals and Charitable Institutions Act, 1885, and charitable institutions not carried on for gain or profit.

"(*h*) Public gardens, domains, or recreation or other public reserves not occupied by a tenant, and all public roads or streets.

"(*i*) Owned and occupied by Maoris only, and not leased to or occupied by any person other than the Maori owner.

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"(*j*) Any public railway, including the land occupied and used as permanent way, and for yards, stations, sheds, and all buildings used for the purposes of traffic only, but not further or otherwise.

"No lands vested in Her Majesty or in the New Zealand Railway Commissioner, nor any land vested in any corporate or other body for the purposes of, or in relation to, local self-government, or for any educational, or public charitable purpose, shall be liable to taxation under this Act, except when there is a tenant or occupier liable to pay such tax."

The sub-section which has just been quoted creates certain exemptions from the taxability of lands and buildings. Its sub-sub-sections, which are denoted alphabetically, only exempt such lands or buildings as are actually used or occupied for one or other of the purposes therein specified. Thus, in the case of any school which is not carried on exclusively for pecuniary gain or profit (*b*), or of a charitable institution not carried on for gain or profit (*g*), the exemption obviously has no application, except to an institution which has been erected and is in actual operation. It is therefore unnecessary to consider whether, if the Ulster Institute had been completed according to the testator's directions, exemption could have been claimed for it under one or other of these heads. In that case the claim would not have extended beyond the building and its site; and if it were held to be a school within the meaning of sub-sub-section (*b*), not more than fifteen acres used and occupied for the purposes of the institute would be entitled to exemption.

The concluding enactments of sub-s. 1 have a much wider scope. They expressly exempt lands vested in the Crown and all the lands vested in any corporate or other body for the purposes of, or in relation to, "local self-government, or for any public educational or public charitable purpose." The trustees of the late Mr. Dilworth, although not a public body, are within the alternative of "any other body," and they are vested for certain purposes with the residue of his real and personal estate. The only question which arises under this part of the sub-section is, whether the appellants

are vested with the residue, so far as consisting of lands, either for a public educational purpose, or for a public charitable purpose. It would be difficult to arrive at the conclusion that an institution like the Ulster Institute, which is unquestionably in the nature of a charity, would not serve any public charitable purpose, seeing that the objects of the charity, who are to be selected from the public, have a vested beneficial interest in perpetuity. And if it were held to be in its character a public charity, the real estate forming part of the residue would be exempted from taxation, although it has not yet been applied to the objects for which it is held by the appellants.

Sect. 3 of the Amendment Act of 1892, which is incorporated with, and must be read as part of the principal Act, appears to their Lordships to be sufficient to entitle the appellants to the exemption which they claim in this appeal. They are not incorporated under the Hospitals and Charitable Institutions Act, 1885, or under any other Act; but the exemption extends to the income derived or received by any and every other body, whether corporate or not, which performs the same charitable function toward the public, "not for any gain or profit."

Their Lordships will humbly advise Her Majesty, in both these cases, to reverse the judgment of the Supreme Court of New Zealand; in the first appeal, to declare that the appellants, as trustees of the will of the testator, are not liable to pay to the respondent death duty upon the real and personal estate vested in them as part of the residue of the testator's estate; to remit to the Court below to determine what refund of duty (if any) the appellants are entitled to demand and receive from the respondent, the Commissioner of Stamps; and in the second appeal, to answer the question submitted by the special case in the negative. In each case the respondent must pay to the appellants their costs of the appeal.

Solicitor for appellants: *Charles D. Woolley.*
Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

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July 14, 15, 16, 20, 21.
1898
April 1.

GREAT NORTH-WEST CENTRAL RAILWAY COMPANY AND OTHERS . Plaintiffs;

AND

CHARLEBOIS AND OTHERS . . . . . Defendants.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Contract by Company ultra vires—Effect of Consent Judgment—Estoppel—Terms on which Contract will be Set Aside—Relief—Misjoinder.

Where by contract, ex facie legal and regular, the appellant company purported to incur liability to the respondent for railway construction in an amount which was in reality calculated to cover the amount of bonus and of price of issued shares payable by agreement between the respondent and all the shareholders of the company irrespective of either actual or estimated cost of construction :—

Held, that the contract was ultra vires of the company :

Held, further, that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of ultra vires not having been raised either in the pleadings or on the facts stated, was of no greater validity than the contract.

In a suit by the company to set aside the contract and judgment, *held*, that they must be set aside on terms which were consented to of paying to the respondent the balance due to him for construction on a quantum meruit, securing the amount thereof by bonds of the company if and when issued, the whole to be taken by him subject to first and other charges in favour of sub-contractors and banks in advance to them who had acted on the faith of the judgment to which they were not parties without notice of the illegalities of the contract.

The company having joined some of their bondholders and shareholders as co-plaintiffs, raising questions affecting them individually, *held*, that the action of the Court should be confined to issues between the company and the defendants.

Appeal from a decree of the Supreme Court (March 28, 1896), reversing a decree of the Court of Appeal for Ontario (May 14, 1895), which affirmed a decree of the Chancellor of Ontario (Jan. 22, 1894) which was in favour of the appellants.

* *Present:* Lord Hobhouse, Lord Macnaghten, Lord Morris, Sir Richard Couch, and Sir Henry de Villiers.

The suit was brought by the railway company and Delap individually and as a shareholder on behalf of himself and all other shareholders therein (except the defendant Codd) and Louisa Mansfield, for the purpose of setting aside a judgment purporting to be by consent of parties in an action by the respondent Charlebois against the railway company, enforcing the remedies claimed by Charlebois under a contract between himself and the company; and also of setting aside an order of sale dated February 29, 1892, of the company's property, founded upon and carrying out the terms of the said consent judgment; and also of having the contract declared void; and for other relief.

The appeal raised questions of ultra vires and fraud under the circumstances stated in their Lordships' judgment affecting the contract and the consent to the said judgment. There were also questions as to the validity of a pledge of the bonds of the company for advances alleged to be antecedent, and as to the relative rights and priorities of the bondholders and Charlebois under the contract.

The Chancellor found on the evidence that upon September 16, 1889, the date of the impeached contract, the issued shares of the company were all fully paid up; that the sum of 50,000*l.* paid to Charlebois on that date was the money of the company for which Charlebois was bound to give credit as against his claim in respect of the contract; that the 200,000*l.* embraced in the contract was in great part made up of amounts which were not chargeable to the company, namely, the $226,000, $37,000, and $173,000 mentioned in their Lordships' judgment; that the contract and the consent to the judgment were ultra vires in respect of the said amounts; that the total amount of the said judgment should be reduced by the said amounts, and also by the value of the contract work not completed by Charlebois at the date of the judgment; that the lien and charge granted by the contract to Charlebois was ultra vires of the company, and void to the extent specified by the Chancellor.

A material portion of the Chancellor's judgment was as follows: "A company created by Act of Parliament has no

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right to spend a penny of its money except in the manner provided by the Act. The expenditure of money for a purpose unauthorized by the Act is ultra vires absolutely. Such an expenditure cannot be validated by promoters, directors, or shareholders for the time being, nor can it be sanctioned by the company itself. It follows that, if the act is beyond the power of the company to do or ratify, no judgment obtained by the consent of the company treating it as authorized can remove its invalidity, for the virtue of such judgment rests merely on the agreement of the parties, and the incapacity to do the act involves the incapacity to consent that it be treated as valid. I think, therefore, that the judgment by consent obtained by the defendant Charlebois against the company (upon which depends the subsequent judgment in invitum) forms no obstacle to the plaintiffs if the transaction impeached is inherently ultra vires."

The Chancellor also held that the other defendants had no better right or position than Charlebois in respect of the matters in question; and that the company's bonds of 515,600*l.* were validly issued and validly pledged to the plaintiffs Delap and Mansfield for advances to the company for purposes of construction and prosecution of the undertaking.

The Court of Appeal were equally divided as to the findings of fact and the question of ultra vires; but a majority held, in reversal of the Chancellor's judgment, that the bonds had not been validly pledged to Delap, because the pledge was in their view of the evidence for an antecedent debt, and therefore invalid.

The report of the case in the Supreme Court will be found at 26 Sup. Ct. Can. Rep. p. 221.

It will be found that of the five judges who heard the appeal, four—namely Taschereau, Sedgwick, King, and Girouard JJ.—sustained the Chancellor's findings of fact, and his view that the contract was ultra vires; but they held that, notwithstanding the contract was ultra vires, the impeached judgment was a conclusive estoppel against the company and the other plaintiffs.

The same judges agreed with the holding of the Court of

Appeal that the bonds were not validly pledged to Delap on the ground that a pledge of the bonds to secure antecedent advances was invalid, and they came to the same conclusion as to the pledge to Mrs. Mansfield. They, however, disallowed the sum of $130,000 by the consent judgment directed to be paid by the company to M'Michael, trustee for Codd, in respect of his commission of $170,000.

King J. delivered the judgment of the majority. He first affirmed the finding that the contract was ultra vires in all the particulars stated in the Chancellor's judgment. He then gave the grounds of his judgment as follows:—

"But now we come to a wholly different question. Charlebois is not suing upon the contract. That has become merged in the judgment rendered upon it, and the present proceedings are to set aside that judgment or to restrain its enforcement.

"The learned Chancellor was of opinion that the judgment has no greater validity than the contract, because it was determined by consent, and the company could not validly give a consent to treat as valid what was ultra vires.

"In the case of *In re South American and Mexican Co.* (1), decided subsequently to the Chancellor's judgment, it is held that a judgment by consent creates an estoppel to the same extent as a judgment where the Court has exercised a judicial discretion. Then as to the issue of the bonds. The issue to Mrs. Mansfield seems scarcely to rest on stronger grounds than those which the Court of Appeal thought insufficient in the case of Mr. Delap."

Gwynne J., the remaining judge, differed, holding that there had been fraud in obtaining the contract and judgment to the extent of $173,000, and that Charlebois' claim should be reduced to $427,093; and he also differed as to the pledge of the bonds, holding that the question was not properly before the Court for decision.

Blake, Q.C., and *Arnoldi, Q.C.*, for the appellants, contended that the Supreme Court was right in affirming the Chancellor's findings of fact, and in ruling that the contract was ultra vires.

(1) [1895] 1 Ch. 37.

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But it erred in holding that the consent judgment was a conclusive estoppel. The case of *In re South American and Mexican Co.* (1) related to a case of a perfectly valid transaction, and the attack upon the judgment in that case was not based on the contention that the transaction on which it was founded was ultra vires. See also *Huddersfield Bank Co., Limited* v. *Lister* (2) and *Attorney-General* v. *Tomline.* (3) The impeached judgment could have no higher validity than the contract. Moreover, the judgment and consequent order for sale are contrary to public policy, being subversive of the scheme of Parliament in the interest of the public for the construction of a through line of 450 miles, which is to be sold for the benefit of Charlebois. The bonds issued by the company were by the Charter Act (51 Vict. c. 85), ss. 14, 15, a first preferential charge upon the company and its property; and were validly pledged to the co-plaintiffs, who were entitled to priority over the respondents.

M'Carthy, Q.C., and *Travers Lewis*, for Charlebois and others, including the Union Bank of Canada, contended upon the evidence that the contract of September 16, 1889, was made without any fraud or fraudulent design. The contract was made by and with the consent of all parties, including all the shareholders in the railway company. It was not ultra vires of the company either in whole or in part, and having been executed it could not be set aside by the company which had accepted the benefit of it except upon the terms of making restitution in integrum. The evidence shewed that all parties had continuously acted on the faith of a subsisting and binding contract, and it was too late now to set it aside: see *British and American Telegraph Co.* v. *Albion Bank.* (4) Otherwise the consent judgment obtained thereon in presence of the Court constitutes res judicata as completely as a judgment in invitum. It was conclusive on the company as well as on Charlebois, not only in regard to all matters actually brought up as a defence, but also in regard to all grounds open to the company as a defence at the time, and which might if presented have formed

(1) [1895] 1 Ch. 37.
(2) [1895] 2 Ch. 273.
(3) (1877) 7 Ch. D. 388.
(4) (1872) L. R. 7 Ex. 119.

a valid defence thereto. Reference was made on this subject to *In re South American and Mexican Co.* (1); *The Bellcairn Case* (2); *Patch* v. *Ward.* (3)

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The respondents other than Charlebois, being holders of Charlebois' orders on the company in the nature of equitable assignments for full value accepted by the company, are in the same interests. So far as they had no notice of the invalidity (if any) of the contract or judgment on the faith of which they acted, they stand in a higher position.

As regards the co-plaintiffs, the bonds were never lawfully delivered or pledged to them, and the mortgage purporting to secure them was invalid. At all events, Charlebois' lien under the contract was prior and paramount to those bonds. Not merely was the creation of a lien intra vires the company; so also is the sale as directed by the order of February, 1892: see *Redfield* v. *Wickham.* (4)

M'Carthy, Q.C., and *A. D. Maclaren*, for the executors of Crossen.

Tupper, Q.C., and *Nugent*, for Macdonald, Preston, and others, including the Commercial Bank of Manitoba.

Blake, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. This suit was instituted for the purpose of invalidating a contract purporting to be made on September 16, 1889, between the plaintiff company and the defendant Charlebois, and a judgment obtained upon it by him against the company on September 25, 1891. The main questions are: 1st, whether the contract was a breach of trust by the company's directors and Charlebois, as alleged in the claim, or was ultra vires of the company according to the majority of judicial opinions below; and, if so, 2ndly, whether the judgment obtained on it could be impeached. There is also another judgment or order passed in February, 1892; but that, it is agreed on all hands, is only supplemental to the earlier one and must stand or fall with it.

(1) [1895] 1 Ch. 37.
(2) (1885) 10 P. D. 161.
(3) (1867) L. R. 3 Ch. 203.
(4) (1888) 13 App. Cas. 467.

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The Chancellor of Ontario, who presided at the trial, held that the contract was as to certain payments covered by it ultra vires, and that the judgment having been obtained by consent was impeachable to the same extent as the contract. On appeal, the Ontario Court, consisting of four judges, was equally divided. Two judges, differing in their reasons, thought that at least the judgment of 1891 ought not to be impeached. But the Chief Justice and another learned judge concurred with the Chancellor. The appeal therefore stood dismissed. Then the case was carried to the Supreme Court of Canada, consisting of five learned judges. Gwynne J., differing from the rest of the Court, thought that the decree below should be maintained in some important particulars. The other four, whose views are stated by King J., held that, though the contract was as regards the payments complained of ultra vires, the judgment of 1891 was not impeachable except as to one item amounting to $130,000. To that extent, therefore, the plaintiff company has got relief; but in other respects their suit stands dismissed, though without costs.

This suit is framed in a very unusual way, because the company has joined to it as co-plaintiffs Mr. Delap, who sues not only as a shareholder on behalf of himself and all others, but also in the character of a holder or pledgee of the bonds, and Mrs. Mansfield, who sues as another holder or pledgee. The objection of misjoinder was not taken successfully in the Courts below, and it must be taken as decided between the parties in this suit that misjoinder is not fatal to it. As the matter is treated by the Supreme Court, no embarrassment arises from the joinder of bondholders; but in the view of their Lordships there is difficulty in deciding the issues raised by their presence.

The history of the contract has been loaded with a vast amount of preliminary detail which may have been necessary in the first instance for the exact understanding of its nature, but is quite unnecessary now. There is little dispute upon any material matter of fact. The facts necessary to found their Lordships' judgment are mostly stated by King J. in delivering the views of the majority of the Supreme Court. The contract is on the face of it quite legal and regular. It is for the con-

struction by Charlebois of fifty miles of railway in consideration of 50,000*l.* paid down by the company, and 150,000*l.* more to be paid by them on completion. The objections to it are founded on extraneous circumstances.

The company was formed in the year 1886 under the public statutes and a charter from the Crown. The nominal capital is $2,000,000. In 1887 5000 shares of the nominal value of $100 each had been issued, and 30 per cent. paid up on them. They became all vested in five persons, who were also directors of the company—namely, Charlebois, Clemow, Allan, Devlin, and Murray. In 1888 those five persons agreed with one Codd that for the sum of 200,000*l.* they would sell him all their shares, and also construct the first fifty miles of railway, but Codd was to have a bonus for himself equal to $173,000 out of the 200,000*l.* Codd could not find the money, nor was any forthcoming till Delap took the matter up in 1889 and offered to find 50,000*l.* In September of that year one Stevens, acting for Delap, Codd, and the five shareholders, made arrangements among themselves to the following effect: Charlebois was to buy up 4300 shares held by the other four at the price of $226,000: these shares and the remaining 700 belonging to Charlebois himself, valued on the same principle at $37,000, were to be transferred to Stevens or his nominees: 45 per cent., or $225,000, was to be paid upon the 5000 shares, which, after allowing a discount of 25 per cent. in consideration of immediate payment, would make them fully paid-up shares; and certificates of paid-up shares were to be issued: Stevens was to pay 50,000*l.*, reckoned as $243,000, to the company's credit at their bank; the transferees of the shares were to become directors of the company and Stevens to be president; then the company so reconstituted was to make a contract with Charlebois, in form a simple construction contract, for fifty miles of road at the price of 200,000*l.*: 50,000*l.* (being in fact the sum paid to the company by Stevens) was to be handed over to Charlebois immediately: out of it he was to pay over to his four colleagues at once sums aggregating $126,000, and he was to secure to them the balance of the price of their shares by assignments of portions of his contract price, equal

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to $100,000 more; Codd also was to have his old bonus of $173,000 out of the contract price. In stating these sums of money their Lordships have for brevity used round figures.

All these arrangements were carried into effect in due form on one day—namely, September 16, 1889. The effect on the company was this: that it was saddled with the payment of 200,000*l.* ostensibly for the construction of fifty miles of road; and it was made to appear as getting a length of road valued at 200,000*l.*, whereas in point of fact that sum was not paid or estimated for construction, but was calculated to cover Codd's bonus and the price of shares, which had nothing to do with construction.

The only argument which the defendants' counsel can find to support the transaction is founded on a contention that the 50,000*l.* never became the money of the company, but remained the property of Stevens till it passed to Charlebois. How far that would affect the substantial rights of the case need not be discussed, because it cannot be maintained as a matter of fact. Mr. M'Carthy cannot resist the conclusion that if the shares became paid-up shares the money must have passed to the company. He is, therefore, driven to argue that the careful processes employed to give the shares the character of paid-up shares were all a farce and are to go for nothing; and that the shares remained liable in the hands of their transferees to calls of 70 per cent. Such a suggestion did not meet with favour in any of the Courts below, and their Lordships do not view it with any greater favour. They have no doubt whatever that the 50,000*l.* became, and was intended to become, the property of the company, and as such served a very material purpose; although it was the common intention of the limited groups of outgoing and incoming shareholders to pay it back immediately to Charlebois. That being so, it was unlawful to apply the money to purposes which had nothing to do with construction under the veil of a construction contract.

This conclusion is also the conclusion arrived at by the Supreme Court. That Court further holds that so far as regards a sum of $130,000, part of the $173,000 ordered to be paid to Codd, the judgment of 1891 cannot be enforced. But

as regards the other subjects of dispute, the Supreme Court holds that the contract has become merged in the judgment, and that the judgment ought to be enforced. This then is the next question to be considered.

In stating the material facts that relate to the judgment their Lordships again refer to the statements of King J. On September 9, 1891, the company sued Charlebois for breach of contract, and two days afterwards Charlebois sued the company to recover the balance due on his contract and to establish a lien on the road which the contract purports to create in his favour. He then moved for an injunction, when affidavits were filed and Codd, who was then president of the company, was cross-examined. After about a week's discussion the parties came to an understanding with one another: the motion for injunction was turned into one for judgment, which was passed accordingly on September 28 and is the judgment in question. It is agreed at this bar that nobody except Codd was served with notice in the suit; that there is no trace of any meeting or action of any one else connected with the company; that no pleadings were filed; that the question of the contract being ultra vires was not raised; nor were the facts stated on which it could be raised.

The judgment declares that Charlebois had a lien on the company's railway and other property for the sum of $622,226, and it orders the company to pay that sum with interest. At the request of Charlebois that sum is to be distributed in various channels: to himself, for his own use or for the use of any person or corporation to whom he might have assigned the moneys payable under his contract, $380,397 with interest; to Mr. M'Michael, as trustee for Codd, $130,000, to which Codd's original bargain for $173,000 had been reduced by dealings between him and Charlebois; and three other sums to three sets of claimants under Charlebois, either as sub-contractors or purveyors of rolling stock.

Of course those judges who think that the contract though improper was not ultra vires have no difficulty in holding that the judgment is binding, whether by way of ratification or by its own force. But the difficulty is to reconcile an opinion that

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the contract is ultra vires with an opinion that a judgment obtained as this was is a binding judgment. The authorities referred to by the Supreme Court do not relate to contracts ultra vires. It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross-action, were equally insisting on the contract. The president, who appears to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the Court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded.

The next question is how to deal with a contract vitiated in such important respects. The Courts in Ontario held that the payments ultra vires could be so separated from the lawful payments for construction, that it was open to them to maintain the contract while disallowing the wrongful payments. The appellants object to that course, and so do the counsel for Charlebois, both preferring that the contract should be wholly set aside, and that Charlebois should be left to recover the value of his work. Not only is that the more direct and usual course, but it seems to their Lordships that to resolve the consideration for the contract into its component elements is not a simple thing, and they are not satisfied that justice is done by it. It might well be that Charlebois was satisfied with the round sum of 200,000*l.* because it covered large items in the complicated arrangements between the various parties; and he may have given to the company works the value of which is greater than the contract price diminished by the unlawful payments to Codd and for the shares. Their Lordships think that the contract and the judgment should be set aside, and that

there should be an inquiry how much is due to Charlebois over and above the 50,000*l.* which was paid to him on September 16, 1889.

There has been a great deal of argument about the validity of the lien adjudged to Charlebois. The case is a very peculiar one. By his contract Charlebois was to have a full and complete lien and charge for the unpaid 150,000*l.* upon the road and its equipments, and upon the land grant earned by it, with a right of operating the railway. At that time no road was made. In September, 1891, Charlebois or his sub-contractors gave up to the company the use of the road then made, and the company thereby earned and received a land grant. That was one of the terms of the judgment of September, 1891. The same judgment affirmed his right to the lien as granted, and went on further to declare that he had the full rights of a mortgagee with judgment for sale, and that the company were to be subject to the order of the Court as to any conveyance required.

Independently of the infirmity which affects the judgment on the grounds before stated, it is difficult to maintain the lien so expressed. The land is stated to be in Manitoba, and the sale of it cannot be conducted nor possession given by an Ontario Court, nor of course has either the Supreme Court of Canada, or Her Majesty in Council sitting in appeal from an Ontario Court, any wider jurisdiction. In point of fact, their Lordships are given to understand that a receiver appointed by the Manitoba Court is in possession. Moreover, it is not contended by Mr. M'Carthy that Charlebois could exercise the power of operating the road. If he had retained possession on the ground that he was unpaid, the property would have remained idle and useless to everybody.

Their Lordships do not now discuss the somewhat intricate questions as to the powers which the company have to create charges on their line or on their land subsidy under the charter and the Acts of 1879 or 1888. They think that the lien must share the fate of the rest of the judgment which creates it. As between the company and Charlebois, Mr. Blake undertakes on behalf of the company that, directly they can float the

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bonds which they have power to issue and are trying to issue, he shall have a sufficient amount to secure him the balance ultimately found due to him. No doubt it is hard upon him not to be paid for his work; but the hardship comes of his having a debtor who is without funds and without personality, and restricted in legal capacity; and it cannot be remedied by retaining an illegal judgment, even if that could be of any effectual service to him.

It is now necessary to advert to the other respondents. Mr. M'Carthy appears for the Union Bank of Canada, and he contends that as regards advances made by them to Charlebois the company are estopped from disputing the validity of the contract. The bank was not a party to the suit of 1891, nor is it named in the judgment of that year, but it claims to be one of the persons or corporations to whom Charlebois assigned money and for whose use $380,000 were to be paid to him. Its case is that in October, 1889, the directors of the company passed a resolution to accept Charlebois' orders for payment to third parties, provided they did not exceed the balance due to him; that Charlebois then applied to the bank to advance $150,000; that he drew orders upon the company in favour of the bank to be paid out of the moneys arising from and payable under the construction contract; that the company accepted those orders, and at the same time stated that there was sufficient margin to meet them in the amount due to Charlebois over and above similar orders previously accepted by the company. This is represented as a distinct undertaking on the part of the company that the sum paid to Charlebois shall be sufficient to meet the advances of the bank. It seems to their Lordships that the bank cannot stand on a higher footing than Charlebois himself, and that indeed is the view which has prevailed in the Courts below. The terms of the judgment certainly do not place the bank on any higher footing; for the payment is to be to Charlebois for the use of himself and his unspecified assignees. And the statement of the company which has been relied upon does not amount to more than this—that the previous charges were not such as to reduce the amount estimated as coming to Charlebois below $150,000.

It is straining the effect of the correspondence to say that the company entered into a positive engagement that the bank should have $150,000 whatever the state of the accounts under the contract might prove to be, or that the company have precluded themselves from shewing the true facts which affect the contract.

The executors of Crossen have a different case. He supplied rolling stock to Charlebois which has never been paid for. By special contract made with Charlebois in January, 1890, the property in that stock was to remain in Crossen until paid for. The Crossen executors were not parties to the suit of 1891, nor did they appear on September 28. The judgment orders that the company shall pay to them $39,000; and in November, 1891, the solicitors of the executors wrote to the company, saying that they accepted the decree so far as it vests the property in the company, and that they waived their lien on the cars. The cars have since been used for the road by leave of the executors.

The other respondents are in a very similar position. Macdonald and Schiller constructed part of the road under a sub-contract with Charlebois. On September 28, 1891, the sum of $64,429 was owing to them, and they were in actual possession of the road. The Commercial Bank of Manitoba has advanced money to them on the security of these interests. Nugent is the assignee of their interests in trust for them and the bank. Preston is another sub-contractor for part of the road, who on September, 28, 1891, remained in possession, $8400 being due to him. None of these persons were parties to the suit of 1891, but Nugent appeared in court as solicitor for Macdonald, Schiller, and Preston on September 28. The judgment orders the company to pay the sum of $64,429 to Macdonald and Schiller, and the sum of $8400 to Preston. The company agreed by writing under the hands of its president and a director that until payment the sub-contractors should remain in possession.

It will be seen that each of these parties, who had no share in the illegalities of Charlebois' contract, possessed in September, 1891, rights and interests which, though not capable of

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being turned into immediate profit for themselves, it was important for the company to acquire for the purpose of beginning the work of the railway. Those rights were surrendered on or soon after the date of the judgment, and it would be unjust to their possessors not to place them in a position as good as circumstances admit. The difficulties of maintaining the lien have been stated before, but their Lordships conceive that justice will be done, and the position of the Crossen executors and of the sub-contractors and the Manitoba Bank will be no worse, if it is now declared that they are to have pari passu the first charge on whatever sum is found due to Charlebois. This was the course adopted by the Ontario Courts.

Though the Union Bank does not stand upon the same footing with the other respondents, there is no reason why it should not as against Charlebois be declared entitled to the next charge on his debt; and their Lordships understand that Mr. M'Carthy, who represents both these parties in this appeal, is desirous that such a declaration should be made.

It remains to deal with the suit so far as it is the suit of Delap in his character of bondholder, and of Mansfield. Their Lordships have intimated that the joinder of these parties is embarrassing. It may be that, for the time, and for the one purpose of asserting the priority of bondholders over Charlebois's lien, the interests are identical. In other respects, as for instance in the questions raised whether or no the bonds are valid, and whether or no they have been pledged, the interests of the co-plaintiffs, namely, the company or the body of shareholders whom Delap represents on the one hand, and of the bondholders on the other hand, may be found at variance with one another. It is not averred that the bondholders have attempted to take possession of the property, and have been shut out by Charlebois' lien. All they aver is the abstract proposition that they have the first charge on the company's assets, and that to give priority to Charlebois was not within the competence of the parties or of the Court in the suit of 1891. And they pray no relief whatever in respect of the contract or judgment, except that which is prayed by the company.

Under these circumstances their Lordships must express their concurrence in the view taken by Gwynne J. on this head. It seems to them that in a suit constituted as this is, it is unnecessary and undesirable to affirm or to deny that Delap and Mansfield are the creditors of their co-plaintiffs, and that the action of the Court should be confined to the issues between the company and the defendants.

Delap also sues on behalf of himself and all other shareholders. So far as the interests of all shareholders as a body are concerned, it is difficult to see how they differ from those of the company. But the learned Chancellor of Ontario dealt with Delap's position separately in the following passage of his judgment:—

"In taking the accounts Charlebois must give credit for the first payment of 50,000*l.* sterling as paid upon the construction contract. The effect of this will be to leave the stock in the hands of Delap unpaid for; but the true way of working out relief is to let this claim for the purchase-money of the stock, $226,000 plus $70,000, remain as a personal or individual claim against Delap, by Charlebois and the other transferors. Delap being a joint plaintiff with the company, there arises no difficulty on this head; the stock should also be charged with this amount."

And in his decree he reserved the consideration of questions affecting the charges of plaintiffs or defendants on the stock or shares of the company, by way of further directions in the suit.

That part of the Chancellor's decree was affirmed by the Court of Appeal. In the Supreme Court it was reversed as a necessary consequence of the view taken by that Court of the judgment of 1891. Their Lordships entertain a different view of that judgment; but they cannot concur with the Ontario Court in the propriety of their decree on the points now under consideration. They agree with the learned Chancellor that the immediate effect of the transactions of September 16, 1889, was to leave the shares or the bulk of them in the hands of Delap, or of Stevens his agent, unpaid for. If the rights of all parties had been declared at that moment, it seems that Charlebois, having his 50,000*l.* attributed to construction,

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might have claimed against Stevens on account of the shares. What has taken place since that time to affect such claims is unknown so far as this litigation is concerned. The matter may be very simple, or may be very complicated. It is one with which the company as such is not concerned; nor can the shareholders viewed as an aggregate body be concerned in it. It raises questions between Delap as an individual shareholder, and perhaps other individual shareholders, on the one hand, and Charlebois on the other hand. This suit was not framed to raise such questions, and their Lordships cannot think it right to bring them in by way of further inquiry. Charlebois should be left to prosecute his claims independently of this suit. Their Lordships have before intimated that relief should be confined to questions between the company on the one hand, and Charlebois and the interests derived from him on the other. That seems to them a necessary condition of efficiency and finality for such decree as can be passed.

Their Lordships wish to add how strongly they are impressed with the difficulty of working out justice to the parties in this suit, or indeed by any judicial process. The case seems to be one of those in which all parties alike have been thrown out of their calculations by the small returns of an enterprise expected to be more lucrative. In such a case the process of working out legal rights by litigation leads to lamentable delay and expense. That process must be followed if no better offers, but it would be better if the parties concerned could see their way to some just and comprehensive arrangement which could receive legislative sanction.

Their Lordships think that it may assist the parties if they indicate in detail the frame of the decree which they will humbly advise Her Majesty in Council to make. As regards costs in the Courts below, they have followed the views of those Courts in many particulars, departing from them only when obliged to do so by the difference of their view from that of the Supreme Court on the main question of the judgment, and from that of the Ontario Courts in giving relief to or against bondholders and individual shareholders.

As regards the costs of this appeal, their Lordships think that

it would not have been safe for the executors of Crossen or for the claimants under sub-contracts not to appear. In point of fact, they do retain important interests under the decree now proposed, though they cannot keep the legal position given to them by the judgment of 1891. The conclusion is that, so far as costs arise solely between the appellants on one hand and the respondents Macdonald, Schiller, Nugent, Preston, the Bank of Manitoba, the executors of Crossen, Allan, and Devlin, on the other, the parties should bear their own costs. So far as the costs of the appellants have been increased by the appearance and opposition of the Union Bank of Canada, their costs should be paid by those respondents. All other costs of the appellants should be paid by the respondent Charlebois.

The frame of the decree as contained in the Order in Council made on May 19, 1898, is as follows :—

It is declared that inasmuch as the sum of 200,000*l.* to be received by the respondent Charlebois under colour of the construction contract of September 16, 1889, was calculated not for construction alone but to pay $173,133 to J. A. Codd, and $263,525 for the price of shares transferred to Charles Richard Stevens and others, such contract was beyond the powers of the appellant railway company and ought to be and is hereby set aside.

And it is further declared that the said judgment of the High Court of Justice of Ontario of September 28, 1891, and the consequential order of the said High Court of February 29, 1892, were improperly obtained by the respondent Charlebois and ought to be and are hereby set aside.

And it is declared that the sum of 50,000*l.* paid by the appellant railway company to the respondent Charlebois on September 16, 1889, is to be taken in part payment of the sum earned by the respondent Charlebois for the construction of the first fifty miles of the said line; and an inquiry shall be made to ascertain what is properly due to the respondent Charlebois for causing the said line to be constructed, equipped, and running according to the tenor of the contract hereby declared to be void, the appellant railway company undertaking that they will as soon as practicable, having regard to the state of the market and to all relevant circumstances, cause bonds in the power of the company to be deposited in the High Court of Justice of Ontario for securing the amount found due to the respondent Charlebois, the time, mode, amount, and terms of such deposit to be settled by the said High Court if the parties do not agree.

And it is further declared that the respondents the executors of James Crossen deceased and the respondents who are or were sub-contractors and the respondents the Commercial Bank of Manitoba are entitled according to their respective interests to first charges pari passu on whatever is found due to the

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respondent Charlebois for the sums and interest in that behalf mentioned in the said judgment of September 28, 1891, and also for the costs mentioned in paragraph 23 of the decree of the Chancellor of Ontario.

And it is declared at the request of the respondent Charlebois that the Union Bank of Canada is entitled to a second charge on the same fund to secure $150,000 advanced to the respondent Charlebois and interest.

And it is further declared that in this action it is not proper to pronounce any decree as between the plaintiffs J. B. Delap and Louisa H. Mansfield in their alleged characters as bondholders and the defendants; and it is hereby ordered that the bonds mentioned in paragraph 19 of the decree of the Chancellor of Ontario and in paragraph 1 of the decree of the Supreme Court of Canada are to remain in court subject to the further order of the said High Court.

And it is further declared that in this action it is not proper to pronounce any decree as between the respondent Charlebois and any individual holder of shares; but the said respondent is at liberty to pursue any remedy to which he may be entitled by reason of the said sum of 50,000*l.* being by this Order attributed to the payment of construction instead of on account of shares.

And the several appellants in the Supreme Court of Canada are to pay to the appellant railway company their costs in the said Supreme Court, and from the last-mentioned costs and from the costs which the respondent Charlebois was directed by the Court of Appeal of Ontario to pay to the plaintiffs there are to be deducted the costs (if any) caused by the joinder of alleged bondholders in this action and by attempts to establish the priority of such bondholders over other creditors of the company.

And the parties are to be at liberty to apply to the High Court of Justice of Ontario with reference to the security to be given to the respondent Charlebois or to the bonds deposited in court or to any other matter arising under this Order.

Solicitors for appellants: *Gadsden & Treherne.*

Solicitors for Charlebois and others: *Harrison & Powell.*

Solicitors for Macdonald and others: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[HOUSE OF LORDS.]

THE MIDLAND RAILWAY COMPANY APPELLANTS; AND LOSEBY & CARNLEY . . . . . RESPONDENTS.

H. L. (E.) 1899 Feb. 16.

Railway—Regulation—Provisional Order—Charge for Use of Sidings—Reasonableness of Charges—Time allowed for taking Delivery—Jurisdiction of Arbitrator.

A Railway Act confirming a Provisional Order, after empowering the railway company to charge for certain services rendered to a trader a reasonable sum by way of addition to the tonnage rate, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The services included "The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof . . . . And services rendered in connection with such use and occupation":—

Held, that the arbitrator had jurisdiction to determine not only the reasonableness of the sums charged for the accommodation, but all questions necessarily incidental thereto, and among them the reasonableness of the time allowed to the consignee for taking delivery of the merchandise.

London and North Western Ry. Co. v. *Donellan*, [1898] 2 Q. B. 7, approved.

By a circular letter issued to traders in January 1895 the Midland Railway Company gave the respondents notice that as great delays had taken place in discharging coal wagons advice would be given daily to the respondents of the arrival of any wagons consigned to them, and that four days would be allowed to the respondents to unload each wagon exclusive of the day of arrival, and that in the event of any wagon not being unloaded within that period, the respondents would be required to pay siding or standage rent at the rate of 6*d.* per day or part of a day for every wagon not so unloaded and remaining on the railway company's premises.

The company having accordingly charged the respondents 6*d.* per day in respect of wagons not unloaded by them within

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the four days after arrival, the respondents refused to pay on the ground that the charges were unreasonable, and upon the application of the company the Board of Trade appointed an arbitrator to determine the difference.

At the arbitration it was objected on the part of the company that the only matter in difference which the arbitrator had power to determine under the company's Act was the sum which the company was entitled to charge, by way of addition to the tonnage rate, for the use or occupation of any accommodation after conveyance beyond such period as was reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the traders to take delivery thereof, and services rendered in connection with such use and occupation; that on the authority of Collins L.J. in the Railway Commission in *Manchester and Northern Counties Federation of Coal Traders Associations* v. *Lancashire and Yorkshire Ry. Co.* (1) and of Wills and Wright JJ. in *Midland Ry. Co.* v. *Haigh* (2) the arbitrator was bound to accept that four days was a reasonable time to enable the traders to take delivery of the merchandise from the wagons; that he had no jurisdiction to inquire into the question whether a reasonable time had or had not been allowed by the company to take delivery in this case and to determine when the obligation of the company as carriers had ceased, and that his functions were limited to determining what the company was entitled to charge per diem for the depot accommodation and the services rendered in connection therewith after the duty of the company as carriers had ceased, whenever that might be.

On the other hand it was insisted on behalf of the respondents that the four days allowed by the company for taking delivery was insufficient, and that in ascertaining the reasonable sum to be paid it was the arbitrator's duty to inquire whether the company had allowed a reasonable time for the respondents to take delivery in this case, and to determine when the obligation of the company as carriers had ceased.

The arbitrator by his award, after reciting the above contentions, held that his powers were limited to determining only

(1) (1897) 76 L. T. 786. (2) (1896) 13 Times L. R. 135.

what was the reasonable sum to be paid by the respondents for the accommodation given and services rendered, in addition to the tonnage rate, and that he was bound to accept the decision of the Railway Commissioners that the company had allowed proper facilities for discharging the merchandise by allowing four days for that purpose. Accordingly rejecting evidence on the question whether the period of four days was reasonable, he awarded that the reasonable sum to be paid for the accommodation and services was 6*d.* for the first day, 4½*d.* for the second and 3*d.* for each succeeding day, and that those sums should be paid.

Upon a summons at chambers taken out by the company for leave to enforce the award the master ordered that the matter be referred back to the arbitrator for further consideration, and this decision was successively affirmed by Darling J. and the Court of Appeal on the authority of *London and North Western Ry. Co.* v. *Donellan.* (1)

Sect. 5 of the schedule of Maximum Rates and Charges in the Midland Railway Company (Rates and Charges) Order Confirmation Act 1891 (c. ccxix.), which confirmed a Provisional Order of the Board of Trade made under the Railway and Canal Traffic Act 1888, enacted as follows:—

"The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party . . . .

"(iv.) The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof or the consignor or consignee to give or take delivery thereof; or, in cases in which the merchandise is consigned to an address other than the terminal station, beyond a reasonable period from the time when notice has been delivered at such address that the merchandise has arrived at the terminal station for

(1) [1898] 2 Q. B. 7.

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delivery. And services rendered in connection with such use and occupation."

Cripps Q.C. and *W. J. Noble* for the appellants. The arbitrator was right in rejecting all evidence as to the reasonableness or otherwise of the period of four days. The only difference which the arbitrator can determine under the Provisional Order is the question as to the reasonableness of the charges: all other differences are beyond his jurisdiction and can only be determined by the Courts. The arbitrator must assume the reasonableness of the period of time. His jurisdiction only begins after the company have ceased to be carriers. The charges for carriage cover the period of four days, and the maximum charges for dealing with merchandise as carriers are fixed by the Provisional Order. Then it was thought right by the Legislature to give the company statutory power to recover for charges which previously they had no power to recover except by agreement with the traders; and s. 5 enacts that the company may charge for certain services a reasonable sum in addition to the tonnage rate. The tonnage rate covers the period allowed to the traders to take delivery. The contention of the appellants is consistent with the language of sub-s. iv. of s. 5, "accommodation beyond such period as shall be reasonably necessary for enabling the consignee to take delivery." It is necessary to limit the jurisdiction of the arbitrator thus; it cannot have been intended to let him determine questions of law, such as rights of property, title, or the like. The question now raised was not decided in *London and North Western and Great Western Joint Railway Companies* v. *Billington* (1): the point was carefully reserved, but some of their Lordships then forming the House expressed during the argument opinions favourable to the view now contended for.

Lawson Walton Q.C. (*Willes Chitty* and *Gilchrist Alexander* with him) for the respondents.

Noble in reply.

LORD MACNAGHTEN. My Lords, this appeal is an appeal in substance, though not in form, against the decision in

(1) [1899] A. C. 79.

London and North Western Ry. Co. v. *Donellan*. (1) I do not think, my Lords, you will have any hesitation in affirming the judgment in the present case and agreeing with the conclusion arrived at by A. L. Smith L.J., and that admirable judge whose untimely death has deprived the Bench of England of a very great lawyer, and of one of its chiefest ornaments.

My Lords, notwithstanding the ingenious arguments we have heard from Mr. Cripps and from Mr. Noble, I think the case is really a very simple one. The Provisional Order, confirmed by Act of Parliament, authorizes the company to make charges, reasonable charges, in respect of certain specified services; and then the section goes on to say: "Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." I cannot imagine wider words than those. "Any difference"—of course it must be one arising under the section—is to be referred to the arbitrator, and by him determined. I understand that to mean "finally determined," determined once for all. In coming to his determination it must be open to the arbitrator to investigate and to determine any question incidental to that referred to him—any question which must be determined in order to determine finally the point in difference. I agree with what A. L. Smith L.J. said, that the duty of the arbitrator is "to adjudicate upon the whole matter once and for all, and that it is not the true reading of the sections to say that a court of law is to be invoked as regards some matters, and that the arbitrator is to be called in with regard to others." As Chitty L.J. observed: "all the matters which are material for the decision of a difference arising under the section, whatever the difference may be, are within the competence of an arbitrator appointed by the Board of Trade to decide." I think it would be very much to be regretted if some of these questions were referred to one tribunal, and some to another. For my own part, I think if that is the real meaning of the section, it would have been far better if Parliament had not interfered at all. The expense and delay of dealing

(1) [1898] 2 Q. B. 7.

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with the matter piecemeal, as the learned counsel for the appellant propose, would be deplorable.

My Lords, I do not think it is necessary to go minutely through the sections. That task has been performed very fully and very ably by A. L. Smith L.J. I will simply move your Lordships that this appeal be dismissed.

LORD MORRIS. My Lords, I am of the same opinion, and I confess, except for the difference of opinion entertained by judges for whom one has very great respect, the case would appear to me to be rather a plain one.

Sect. 5 enables the company to charge for services ultra their tonnage rates, and whenever any difference shall arise under this section the matter is to be determined by an arbitrator selected by the Board of Trade. When we come to sub-s. iv. of that s. 5 we find that the company are entitled to charge for the use and occupation of their premises for a period ultra the time at which the consignee ought reasonably to have taken delivery. The period fixed for which they are entitled to recover is the time ultra the period at which the consignee should take delivery. That is left general, and at the conclusion of this argument—I have repeatedly put the question and I have not been satisfied with any answer I have heard—I fail to know how any human being can enter upon that inquiry until he has first fixed upon the terminus a quo—from which he is to start. What is to be his starting point? It is given in those general terms in the section: those general terms must be reduced to a certainty. Who by? By the arbitrator before whom the case is pending on the application of the company who applied for the appointment of the arbitrator, and upon their demand for a charge ultra that to which alone they would apparently be ordinarily entitled, namely, their tonnage rate. It is said that that must be decided by some court of law. How could it be decided by a court of law? If the company brought an action in a court of law, they would bring an action not to decide the time—that would be an element—but to decide how much they were to get, and the whole thing would be decided by the court of law, namely, the time, and, as

following from the time, the amount which the company should recover. But in this case, as the matter is brought by the railway company themselves before the arbitrator, it is essential, as it appears to me, that he must first decide what time he is to start from, in order to arrive at a conclusion as to what sum the trader is to pay to the company. That is what the section of the Act of Parliament in my opinion very plainly says, and in addition to that, if one were to use a priori arguments about it, I would say it would be the most excellent solution, that an arbitrator—a man of eminence and experience in such matters—would be a much more competent tribunal, and the Legislature would have acted wisely in trusting it to him rather than to a catch jury, at a trial before a judge and jury.

I am clearly of opinion that the judgment of the Appeal Court should be affirmed.

LORD SHAND. My Lords, I do not suppose that there is difficulty on the part of any of your Lordships in affirming the decision which has been now appealed against. For my part I should regret very much if any other judgment were pronounced, because I think nothing would be more lamentable in the conduct of business of this kind than that it should be found, when a trader had a dispute with a railway company in regard to such claims of demurrage as were provided for by the Order of 1891, that he had to go to the courts of law—ultimately to the Supreme Court it might be—to settle one part of the matter in controversy, and to go to an arbitrator to settle another part of what is really one question only. I do not think that the statute can be read so as to lead to what I would call that lamentable result. If it were so the statute, instead of being beneficial in its effect, would be injurious to companies and traders alike, making it necessary to resort to two tribunals in place of one only as before, for the settlement of what are after all questions of fact really, and of details depending on the special circumstances of each case.

The Act provides that the company shall be entitled to a reasonable sum "by way of addition to the tonnage rate" for the use or occupation of their premises, or it may be for the

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detention of their trucks, beyond the period which is "reasonably necessary" for the trader who is using the accommodation or trucks. Then the same section provides that the question of amount is to be determined by arbitration, and "any difference arising under this section" is to be settled by the arbitrator. The point which the arbitrator has to settle is, what is "a reasonable sum" for the service rendered, the use of the accommodation, or the use of the trucks.

The railway company maintain that these words "reasonable sum" are to be taken in a very limited sense, as meaning merely this: that the arbitrator is to ascertain the rate per day which the company is to receive, but that he has no power to make any inquiry as to the number of days he is to take into view. According to the argument the railway company tell him that number of days, and he must accept that from them, and, if a dispute should arise as to this, that question must go to a court of law.

My Lords, I think that this provision as to arbitration, in which what the arbiter has to do is to fix a reasonable sum to be paid by the trader, includes, as my noble and learned friend on the Woolsack has said, all that is necessary and incidental to the ascertainment of the amount which the trader has to pay to the company. I do not think it is reasonable to say that the arbitrator is not entitled to take the matter of time into his consideration for the purpose of the award, for consideration of the time over which the claim is to run is essential in order to determine what is a reasonable sum. In this case it so happens that the company have issued a circular stating that after four days' use of the trucks after arrival they are to begin to make their charge. Supposing there had been no such intimation made, is the arbitrator simply to take the statement of the company: you shall assess upon one day, two days, or twenty days? It appears to me it is essential to his reaching a "reasonable sum" that he should take the element of time into consideration. The rate per day may in his opinion vary much according to the number of days he is to take into view. The company may, as has been put by Mr. Walton in the argument, have made arrangements that

they were to deliver coals, it may be, at certain fixed intervals, and the trader may have an answer that the deliveries at intervals have not been made as arranged; or it may be that while it was intimated to him that the goods had arrived, there have been obstructions in the way which prevented the trader getting at the trucks, or there may have been failure to provide the facilities which he ought to have had for unloading. All those things must enter into the question of what is the "reasonable sum" to be given by the arbitrator, and it appears to me it would be most unreasonable to read that word "reasonable" in any other sense than that it refers to the sum which should be given day by day, taking into consideration the element of time which I think must be before the arbitrator in order to do justice between the parties.

My Lords, Mr. Cripps pressed upon your Lordships that a difficulty might arise, because on this view the arbitrator in some cases might have to decide a question of title; a question might be raised as to whose property the trucks were, or as to whether the land upon which the particular siding was belonged to the company or to a co-terminus proprietor. It must be kept in view, however, that an arbitrator with reference to such questions is determining no matter of title for any permanent purpose, or with a view to settle the rights of parties in all time coming. He is deciding merely with reference to the comparatively small matter—what is to be done in regard to the particular claim for demurrage, or whatever it may be. For that purpose I think it is a great convenience that he should have the power, which I think the statute gives, to determine that matter of fact to that limited effect. If the company are being prejudiced by a series of decisions of that kind, they have it in their power in another proceeding in court to raise the question as to title and get a decision upon it finally, and of course that would be binding upon any arbitrator afterwards if any question as to the use of that particular siding should arise.

My Lords, the settlement of what is a reasonable sum is a matter eminently suitable for the decision of an arbitrator, presumably an expert, somewhat summarily and with reference

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to the whole circumstances of the particular case, and I have no difficulty in agreeing with your Lordships, and with the judgment of the learned judges of the Court from which this appeal has been taken.

LORD DAVEY. My Lords, I concur, and I may say I am so entirely satisfied with the reasons given by the learned judges in the Court of Appeal, that I do not think it is necessary for me to add anything.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD LUDLOW. My Lords, if there had not been so many different opinions delivered by so many different judges, I should not have thought it necessary to say a single word in this case; but I do desire to say that I entirely agree with the decision of the Court of Appeal, and I only wish to add this observation—that it seems to me perfectly impossible for any arbitrator to determine the reasonableness of the charge without at the same time taking into consideration the reasonableness in respect of the limit of time allowed, that is to elapse before the charge is to attach. It seems to me perfectly impossible that that can be done. I quite agree with the opinions that have been delivered, and I think the judgment of the Court of Appeal is quite right.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 16, 1899.

Solicitors for appellants: *Beale & Co.*

Solicitors for respondents: *Jaques & Co., for G. Turnbull, Bradford.*

[HOUSE OF LORDS.]

POWELL . . . . . APPELLANT;

AND

THE KEMPTON PARK RACECOURSE COMPANY, LIMITED. . . . . RESPONDENTS.

H. L. (E.)
1899
March 14.

Gaming—Place used for Betting—Inclosure on Racecourse—Betting Act 1853 (16 & 17 *Vict. c.* 119) *ss.* 1, 3.

Adjacent to a racecourse there was an uncovered inclosure of about a quarter of an acre, fenced in by iron rails, to which when race-meetings were held the public were admitted by the owners of the racecourse on payment of an entrance fee. Among the five hundred to two thousand persons so admitted were always one or two hundred professional bookmakers, and most of the persons admitted, other than the bookmakers, went for the purpose of backing horses with the bookmakers, but some did not bet at all. The bookmakers, who were accompanied by their clerks, did not use any apparatus such as a desk, stool, umbrella, or tent, but any particular bookmaker was usually to be found in or near the same part of the inclosure, calling out the odds to attract backers. In some cases the backers were required by the bookmakers to deposit their stakes; in others credit was allowed. This use of the inclosure was known to and permitted by the owners thereof:—

Held, affirming the decision of the Court of Appeal, [1897] 2 Q. B. 242 (Lords Hobhouse and Davey dissenting), that the inclosure so used was not "a place opened, kept or used" for the purposes prohibited by the Betting Act 1853.

Held contra (by Lords Hobhouse and Davey), that the inclosure was a "place kept and used" by the owners for the purpose of the bookmakers who used it betting with persons resorting thereto, and (by Lord Davey) for the purpose also of the bookmakers receiving deposits of money on bets, and that the case fell within the Act.

Hawke v. *Dunn*, [1897] 1 Q. B. 579, overruled.

In an action brought by the appellant against the respondents the statement of claim alleged as follows:—

1. The plaintiff is a shareholder of the defendant company. The defendant company is a company incorporated under the Companies Acts 1862 to 1879 for the purposes (inter alia) of carrying on and does carry on the business of a racecourse company, and from time to time holds and conducts race-meetings under the rules of the Jockey Club and the rules of

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the National Hunt Committee in accordance with the provisions of its memorandum of association.

2. The defendant company has for the purpose of its said business acquired and is the owner and occupier of the lands and premises known as the Kempton Park Racecourse, containing a considerable number of acres which is inclosed by means of a substantial fence. Adjoining such course and forming part of the said land and premises the defendant company has fenced off and inclosed by means of iron rails a certain piece of ground or inclosure about one acre in extent and known as Tattersall's Inclosure. Any member of the general public, including the persons mentioned in the next paragraph hereof, is admitted by the defendant company to the racecourse on payment of an entrance fee of 1*s.* on ordinary occasions and 2*s.* 6*d.* on special occasions, and to the inclosure on payment of a further fee of the difference between the entrance fee paid and 1*l.*

3. At every such race-meeting as aforesaid and particularly on the 12th and 13th days of March 1897 the inclosure was opened and kept by the defendant company for the purpose of (1.) certain persons using the same, that is to say professional bookmakers, betting with persons resorting thereto, and (2.) money being received by or on behalf of such persons using the same as deposits on bets made on certain horse-races that were then being held on the said lands and premises under the direction and control of the defendant company.

4. At all such race-meetings the inclosure is and was extensively used by such professional bookmakers for the purposes mentioned in the last paragraph hereof, and the defendant company knowingly and wilfully permit and permitted the inclosure to be so used.

5. By reason of the matters aforesaid the defendant company in addition to its business as keeper of a racecourse is carrying on a business that is illegal under the Betting Houses Act 1853 (16 & 17 Vict. c. 119), and outside the scope of its memorandum of association, and is liable to be indicted and fined and to have its property sequestrated.

6. The defendant company is also spending money out of its

assets in and about the upkeep of the inclosure for the purpose of enabling such illegal business and transactions to be carried on. The defendant company has advertised and intends to hold numerous race-meetings during the present year during which it will, unless restrained by this Court, continue to repeat the said illegal acts and to carry on its business contrary to the provisions of the said Act and of its memorandum of association, and to expend further moneys in and about the conduct of the said illegal business.

The plaintiff claims: An injunction to restrain the defendant company, its agents and servants, from opening or keeping the inclosure known as Tattersall's Inclosure for the purpose of persons using the said inclosure using the same for the purposes of (1.) betting with persons resorting thereto, or (2.) money being received by or on behalf of such persons using the same as deposits made on horse-races: And from knowingly and wilfully permitting the inclosure to be used by such persons for the said purposes or either of them: And from otherwise carrying on its business in a manner contrary to the provisions of the Betting Houses Act 1853 and of its memorandum of association and from expending moneys the assets of the defendant company in and about the maintenance and conduct of such illegal business.

The statement of defence alleged as follows:—

1. The defendant company admits that it is the owner of the inclosure referred to in paragraph 2 of the statement of defence, which is known as the Reserved Inclosure and not as Tattersall's; it does not exceed a quarter of an acre in extent. It is an uncovered inclosure except that on the far side of it from the racecourse there are raised tiers of seats covered over with a roof; this erection forms part of a building known as the Grand Stand, which adjoins this and other inclosures adjacent to the racecourse. The defendant company submits that the inclosure is not a "place" within the meaning of the Act 16 & 17 Vict. c. 119.

2. The defendant company denies that it opens or keeps the inclosure for the purposes alleged in paragraph 3 of the statement of claim or either of them; or that it knowingly and

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wilfully permits the same to be used for such purposes or either of them, as alleged in paragraph 4 of the statement of claim, or that it ever has carried on or intends to carry on any business wholly or partly illegal under the said Act.

3. The bookmakers referred to in the statement of claim frequent the said inclosure on such terms and conditions and under such circumstances that they are not "persons using the same" within the meaning of the Act, but are "persons resorting thereto" in the Act mentioned.

4. It is a fact that a considerable amount of betting is carried on by the bookmakers in the inclosure during the race-meetings, but in such a manner and under such circumstances that the bookmakers do not use the inclosure for either of the said illegal purposes, that is to say, either for the purpose of betting with persons resorting thereto, or for the purpose of money being received by themselves as the consideration for their promise to pay thereafter any sums of money on the event of horse-races within the meaning of the said Act. At the time of the passing of the Act betting of the same character and description had for many years previously been habitually and notoriously carried on in racecourse inclosures, and has since been so carried on until recently without the intervention of the authorities.

Under a master's order the following particulars were delivered of the terms, conditions, and circumstances in and under which the bookmakers frequent the inclosure, as stated in paragraph 3 of the statement of defence, and of the manner and circumstances in and under which betting is carried on by the bookmakers in the said inclosure as alleged in paragraph 4.

1. The inclosure is kept by the defendant company for the purpose of the public being admitted thereto to see the races at meetings held under the management of the defendant company on their premises, and the public are on such occasions admitted thereto subject to the payments specified in the statement of claim. Each person on making the required payment receives a ticket with the words "Reserved Inclosure" printed thereon. Such ticket entitles the person receiving the same to resort to and frequent the inclosure till the close of the

racing on the day of issue, and not further or otherwise; but any such person is liable to be ejected from the inclosure by the defendant company's servants for improper or illegal conduct. Any person passing out of the inclosure may be readmitted on the same day provided that he before leaving obtains a readmission ticket and presents the same on re-admission, but not otherwise.

2. The number of persons admitted to the inclosure on race days varies from 500 to 2000, and among such persons there are always a certain number, varying from 100 to 200, who are professional bookmakers, carrying on their business in manner hereinafter described. The bookmakers are admitted to the inclosure as members of the general public and not otherwise, and on the same terms as to payment, readmission, and in all other respects, nor do they in fact frequent or claim to frequent the inclosure except on such terms. They are not persons having any rights, interest, or control in or over the inclosure or other premises the property of the defendant company, nor have they any special rights or privileges therein. Of the other members of the public frequenting the inclosure the greater number go there for the purpose of "backing" horses with the bookmakers, but a certain number do not bet at all.

3. The bookmaker in the inclosure invariably carries on the practice of betting as hereinafter described. He is accompanied by a clerk who sometimes is in partnership with him, and who assists him in his transactions. He does not confine himself to any fixed spot in the inclosure, nor does he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same part of the inclosure. No betting lists are exhibited. On the other hand, the backers are persons who back particular horses with the bookmakers, as hereinafter more particularly mentioned.

4. With a few exceptions when betting takes place on future events, betting in the inclosure is confined to betting on the races of the day, and no betting commences on any individual race before the names of the horses which are going to run in that race are announced on the telegraph board—usually about a quarter of an hour before the time appointed for that race to

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be run. Such betting is known as "post betting," and continues in most cases till the fall of the flag, when the horses start, and bets are frequently made while the race is being run. "Post betting" is always done at stated prices or odds, that is to say it may be at stated odds on "the field" (as hereinafter explained) against the horse backed, or at odds on the horse against "the field," or at evens. These prices vary from time to time, as a greater or less extent of money may be forthcoming to back a particular horse or horses. "Post betting," as would appear from the above statement, is not carried on in respect of more than one race at a time. It is confined to the particular race next about to be run or then being run; consequently, as hereinbefore stated, no betting lists are ever exhibited or are required for the purposes of the business.

5. The difference in the method of betting adopted by the bookmaker from that adopted by the other members of the general public who are generally the backers is as follows: The backer for each bet selects as a rule one horse which he desires to back against the other horses engaged in the race, which horses in each case as regards the particular horse backed are then called "the field," and he applies to the bookmaker to name the price or odds at which he will back "the field" against such horse. A backer will also at times, where any horse is at the opening of the betting quoted at long odds, back that horse with a view of laying against such horse, should it subsequently be quoted at shorter odds as hereinafter mentioned. On the other hand, the practice of the bookmaker is to back "the field" against each and every horse in the race as far as possible; and to such an extent and amount that in the result, whichever horse wins, the total amount he will according to his book be entitled to receive from the backers of the horses that are beaten will be in excess of what he may have to pay the backers of the horse that wins, the difference being the profit on his book. While, therefore, it is the object of the bookmaker to back "the field" against as many horses as possible, he must to avoid loss abstain from backing "the field" against any one horse to more than a certain amount—the limit being that his liability in respect of any one horse

must be less than what he will be entitled to receive in respect of the other horses.

6. On application by an intending backer of any particular horse, the bookmaker states the price or odds at which he is willing to back "the field" against such horse. If the bet is made, it is entered by the bookmaker's clerk in a book; and in some cases the backer is called upon to deposit his stake with the bookmaker, as is hereinafter more particularly explained. When a bookmaker is anxious or willing to back "the field" against a particular horse, he calls out the odds which he will give or take in respect of such horse, and frequently the odds are so called out many times without a response being received. By so offering to give or take such odds the bookmaker does not offer to make any bet an indefinite or any number of times, nor does he bind himself to bet with any person who may wish to bet with him and accept the odds so offered. In all cases where there are several horses engaged in the race there are some against which the bookmaker is anxious to back "the field"; consequently this practice of calling out odds is largely adopted by every bookmaker betting in the inclosure for the purpose of attracting the attention of backers.

7. Backing horses against "the field" is not confined to the backer, nor is backing "the field" against particular horses confined to the bookmaker. When a bookmaker has backed "the field" against a particular horse up to his limit (as hereinbefore stated and explained) he will usually refuse to back "the field" against that horse further. A bookmaker will frequently back horses under the following circumstances: (1.) if he has exceeded his limit; (2.) if he has laid short odds on "the field" against a horse which subsequently goes to a longer price; (3.) if he has special information that a horse is likely to win. Conversely, if a backer has backed a horse at long odds, whether before the meeting or in the inclosure, and the horse goes to a shorter price, he frequently endeavours to back "the field" against the horse at such shorter price, and if necessary calls out the odds at which he will so back "the field" in the same manner as is hereinbefore described in the case of the bookmaker.

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8. The number of bets made by a bookmaker on each race under the circumstances hereinbefore described is greatly in excess of that made by a backer even though the latter may be systematically backing horses, and one bookmaker makes bets on each race with numerous backers. The businesses of the various bookmakers are rival and competing; and the business of each bookmaker is independent both of that of every other bookmaker and also of the defendant company as owner of the inclosure. No one bookmaker does or could bet in the manner and under the circumstances hereinbefore described with all persons who resort to the said inclosure, or with more than a small fraction of such persons. The defendant company have no knowledge of what persons do and what persons do not act as bookmakers in the inclosure. No person in the inclosure is admitted with or has any greater or any less right to act as a bookmaker than any other person, although in fact and practice the limited number of persons who do act in that capacity collectively form the market for such bets as the rest of the public or the backers wish to make.

9. Some bookmakers carry on a ready-money business in the inclosure—that is, they usually require the backer to deposit his stake in respect of the bet at the time the bet is made. The bet is then entered in the book and the backer receives a ticket corresponding with the entry so made. Others do the greater part of their business on credit—that is to say, no money is deposited on either side; but they only do business in this way with persons whom they know to be of good credit. Should any person who was unknown to them offer to bet with them they would either decline to bet or require such person to deposit his stake. Saving as aforesaid, no money is deposited in respect of bets made or to be made in the inclosure.

10. The foregoing particulars contain a full and accurate account and description of the betting which is carried on not only in the inclosure forming part of the defendant company's premises, but in all racecourse inclosures in which betting takes place. At the time of the passing of the Betting House Act such inclosures were in like manner frequented by book-

makers, and betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the present century. Ever since the passing of the Act up to the present time bookmakers have openly and habitually continued to carry on a similar kind of betting in such inclosures, and until recently without any suggestion of its being illegal.

The action was tried before Lord Russell of Killowen C.J., without a jury, upon the pleadings and particulars. It was admitted by the defendants that they knew and permitted the use which was made of the inclosure at race-meetings. Upon the authority of *Hawke* v. *Dunn* (1) his Lordship gave judgment for the plaintiff and granted an injunction. This judgment was set aside and judgment entered for the defendants by the Court of Appeal (Lord Esher M.R., and Lindley, Lopes, A. L. Smith and Chitty L.JJ., Rigby L.J. dissenting). (2)

During the course of the argument in this House Asquith Q.C. said that in the interpretation of the appellant's admission of the 10th particular the character and extent of the inclosures and of the betting therein carried on should be limited in the following respects, as set forth in the appellant's case :—

The material facts so far as they are known are that— (1.) Inclosed spaces have been in existence at race-meetings for a long time prior to the passing of the Betting Act of 1853, and in some cases from the beginning of the century, in which betting took place, and for the purpose of betting. Such inclosed spaces were sometimes (*a*) railed inclosures called "betting rings" or "posts" in parts of the racecourse or grounds remote from, or not belonging to the Grand Stand; (*b*) railed inclosures adjacent to the Grand Stand; (*c*) separate and detached buildings on the racecourse or grounds. (2.) In other cases the Grand Stand itself or some part thereof was used for the same purpose. Prior to the passing of the Betting Act of 1853, the betting in these inclosed spaces was for the most part credit betting. Ready-money betting did occasionally take place therein, but only to a small extent. (3.) The

(1) [1897] 1 Q. B. 579. (2) [1897] 2 Q. B. 242.

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practice of giving tickets was not adopted by bookmakers until recent years.

1898. May 5, 6, 17. *Asquith Q.C.* and *Cautley* for the appellant. This is a friendly action brought by a shareholder in the defendant company against the company to determine important questions of law. If the plaintiff is successful it will prevent the company carrying on their business as heretofore. It is not, what it has been called, a collusive action, if by that is meant that the statement of facts is perverted, or misleading by reason of the suppression of material facts. The preamble of the "Act for the Suppression of Betting Houses" (whose title is by the Short Titles Act 1892 (c. 10) declared to be "The Betting Act 1853") recites that "a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies." The practice of requiring money to be paid in advance sprang up after the Gaming Act 1845 (c. 109), which made wagers void and irrecoverable. The preamble of the Betting Act 1853 is enlarged by the enacting part in three respects. "Houses or offices" are expanded into "house, office, room or place": "owners or occupiers" into "owner, occupier, keeper, or any person using the same . . . ."; and "the receiving of money in advance" into "betting" generally. The question is whether the reserved inclosure is a "place used for the purpose of the persons using the same betting with persons resorting thereto" within the meaning of s. 1. If it is not, the Act is indeed easy to evade. The bookmakers use it habitually for the purpose of betting with the persons who resort to the inclosure, and the company "knowingly and wilfully permit" the inclosure to be so used, within the meaning of s. 3. Sect. 1 prohibits such a user of such a place, and declares every place so used to be a common nuisance and contrary to law, and s. 3 makes every

person so using it liable on conviction to a penalty. What then is a "place"? The authorities are conflicting. It need not be a building or covered area, but it must be an ascertained place capable of having an owner or occupier: *Doggett* v. *Cattarns* (1), where the Exchequer Chamber reversing the decision of the Common Pleas held that the space under a tree in Hyde Park was not a "place" within the Act, though some of the judges thought it was. The place here is ascertained: the area of one quarter of an acre is inclosed and the bookmakers can be found there by any one desiring to bet with them. The Act may have been primarily directed against houses or places in streets, betting "hells," public-houses where lists were exposed, and the like, but it is not confined to such places: it includes temporary wooden structures, unroofed, put up on racecourses: *Shaw* v. *Morley* (2); a stool on which the betting man stood covered by a large, tall umbrella, on an uninclosed racecourse: *Bows* v. *Fenwick* (3); an inclosed area uncovered where bookmakers without any room, office, stool or umbrella betted on pigeon-shooting: *Eastwood* v. *Miller* (4); an uncovered inclosed place where though the tenant does not himself use the place for betting he "permits" it to be so used because he knows it is in fact so used: *Haigh* v. *Town Council of Sheffield* (5), shewing that betting need not be the only purpose for which the place is used, but may be ancillary to the other and principal purpose. The last two cases must clearly be overruled if the decision below in the present case is right. It is beside the mark to point to Goodwood and ask if the Duke of Richmond is to be convicted under the Act. If it is really desired to stop professional bookmakers from carrying on their besiness in inclosed places the owner or occupier can do it: if he does not choose he must take the consequences. It is said that the Act cannot have contemplated such places because s. 11 gives power to justices to grant warrants to search suspected

(1) (1864) 17 C. B. (N.S.) 669; (1865) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 46, 159.
(2) (1868) L. R. 3 Ex. 137.
(3) (1874) L. R. 9 C. P. 339.
(4) (1874) L. R. 9 Q. B. 440.
(5) (1874) L. R. 10 Q. B. 102.

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places. That is only where the betting is clandestine: no justice would grant a warrant where the betting is open. It is of course a question of fact in each case whether the owner or occupier does "permit" the place to be used for the purposes of betting: *Reg.* v. *Cook* (1); and whether any person "uses" a place for that purpose: *Snow* v. *Hill.* (2) To support a conviction it is not necessary that the place should have been previously used for illegal betting; it is immaterial that the principal user of the place is legitimate; and the "place" does not necessarily mean one particular spot, but may include a large area, in which the professional betting man does not remain stationary: *Reg.* v. *Preedy* (3), where a public-house legitimately open for the ordinary customers was used by professional betting men; and see *Hornsby* v. *Raggett* (4), and *Liddell* v. *Lofthouse.* (5) In *Hawke* v. *Dunn* (6) five judges held that an inclosure used precisely in the same way as the present was a place used for the purpose of betting with persons resorting thereto within the meaning of the Act. If the inclosure were demised, so as to give exclusive occupation to one or more bookmakers who carried on their business as it is done here, it would be clearly within the Act. What difference can it make that the bookmakers are admitted with the public and as part of the public? The large majority of persons who use the inclosure go for the purpose of betting, and there is ample evidence that the place is devoted to that purpose. The bookmaker uses no stool or umbrella, but he takes into the inclosure his clerk, his book and his reverberating voice, all his stock-in-trade.

Joseph Walton Q.C. and *Stutfield* (*C. W. Mathews* with them) for the respondents. The cases referred to may be classified thus: (1.) those where as in *Shaw* v. *Morley* (7) the inclosure is let to some one who carries on the prohibited betting and is clearly within the Act; (2.) public-houses used as betting offices;

(1) (1884) 13 Q. B. D. 377.
(2) (1885) 14 Q. B. D. 588.
(3) (1888) 17 Cox, C. C. 433.
(4) [1892] 1 Q. B. 20.
(5) [1896] 1 Q. B. 295.
(6) [1897] 1 Q. B. 579.
(7) L. R. 3 Ex. 137.

(3.) the umbrella and stool cases where the bookmaker occupies a fixed spot and makes it his "place," none of which cases touch the present; (4.) cases like the present, like *Eastwood* v. *Miller* (1), *Haigh* v. *Town Council of Sheffield* (2), *Hawke* v. *Dunn*] (3), and *Henretty* v. *Hart* (4), where an inclosed racecourse was held not to be a "place" within the Act, and upon facts similar to the present it was held that the owner did not permit the racecourse to be used for the purpose of betting. The Act did not intend to make all betting illegal, or it would have been so expressed, nor even betting by bookmakers. It is not every kind of user of a place that comes within the Act: the place must be appropriated or devoted by the person who uses it to the purpose of his betting house or office; the business must be the business of the place, and not merely of the person. The object of the Act was to prevent betting offices being set up: somebody must appropriate the place so as to make it his betting office; if that is done it is enough to bring the case with the Act. The inclosure in question is not so appropriated: it contains part of the Grand Stand; it admits to the Grand Stand, the paddock and other privileges, and a large part of those who pay the 1*l.* for admission to the inclosure do so in order to enjoy those privileges and do not bet at all. There is no difference in principle between the 1*l.* inclosure and the whole inclosed racecourse for admittance to which people must pay. The public-house cases come within the very mischief aimed at by the Act. Men shut up their offices when the Act was passed and transferred their business to the public-houses, using them as their offices. If such cases were not held to be within the Act it would be useless. The "person using the same" must be ejusdem generis with the preceding persons named in the statute, namely "owner, occupier or keeper" of the place: he must have some relation to the premises such as they have. If making a book on the races is enough to bring a case within the Act then one man so using the place turns it into a common gaming-house: s. 2. If the

(1) L. R. 9 Q. B. 440.
(2) L. R. 10 Q. B. 102.
(3) [1897] 1 Q. B. 679.
(4) (1885) 13 R. 9.

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bookmaker, the principal, is a "person using the same" within the Act, so must his assistant be: but the assistant certainly does not assist in carrying on the business of the place, either at Goodwood or on racecourses such as the one now in question. The Act is not aimed at betting: the Legislature wished it to flourish as conducted at these racecourses.

Asquith Q.C. in reply. No doubt the "place" must be capable of being and must in fact be the centre and the seat of a betting business: and that is what this inclosure is. The substantial purpose of this inclosure is to carry on the business of betting: at least in the case of the majority of the people who use it. How does this case differ from cases admitted to be within the Act except that the bookmaker moves about within the inclosure? The tent or umbrella might occupy 100 different spots in one afternoon: they are not the less "places" within the Act. The bookmaker can be easily found in the inclosure by his customers, and each of his customers goes there for the purpose of finding him and betting with him. Admit (for the sake of argument only) that a "person using the place" must be ejusdem generis with "owner or occupier." What then? Is not a bookmaker—permitted by the owners of the inclosure to occupy and use it for the very purpose of betting with the persons who come there—of the same genus as an "occupier"? He is an occupier. If this be not so any owner can evade the Act by allowing an occupier to occupy for the prohibited purposes. No doubt many of the legislators who passed this Act intended betting and bookmaking to continue. But that is not the test. The question is, what is the ordinary natural meaning of the words used?

The House took time for consideration.

1899. March 4. EARL OF HALSBURY L.C. My Lords, the statement of claim in this case sets forth that the plaintiff is a shareholder in a company incorporated to carry on the business of a racecourse company, and it asks that an injunction may issue to restrain the use of part of the company's premises for what is alleged to be an illegal purpose.

If the purpose for which the part of the premises in question is to be used is illegal, the injunction ought to be granted; if not, the action ought to be dismissed.

Before dealing with the substance of the question which comes up on appeal from the Court of Appeal to your Lordships, I think it right to say that in my view it is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the Court before whom it comes must decide according to law, and the construction of the Act of Parliament is a pure question of law, and must be decided according to its legal construction, whatever may be the motives and wishes of the respective litigants. The form in which the question arises and the facts proved or admitted may affect the determination of the particular case and its consequent authority as governing other transactions, but the construction of the Act of Parliament must be the same upon whatever facts the question of its construction arises.

It has, indeed, been argued that the history of the legislation and of the facts which gave rise to the enactment may in view of the preamble affect the construction of the Act itself; but though I do not deny that such topics may usefully be employed to interpret the meaning of a statute, they do not, in my view, afford conclusive argument here. Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment; and in this case it appears to me that the question must be decided upon the words of the statute, and upon the facts which are not and never have been contested. Indeed, apart from the historical question which, for the reasons I have given, I dismiss from my consideration for the present, it would be idle indeed for any one to contest what I suppose is true of every race-meeting in the country, and not only applicable to this particular case.

In saying this, however, I think it is right to add that I do not see the least foundation for the suggestion that any fact or argument has been kept back or misrepresented. The argument has certainly been conducted with great ability and

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earnestness, as indeed, was to be expected, considering who were the learned counsel who argued it.

Now, the words which it appears to me your Lordships have to construe are these :—

(1.) no house / office / room or / other place

(2.) shall be / opened / kept or / used

(3.) for the purpose of the / owner / occupier or / keeper thereof, or any / person using the same, or / any person / procured or / employed / by or / acting for or on behalf of such / owner / occupier or / keeper or / person using the same or of

(4.) any person having the / care or / management, or in any manner conducting the business thereof

(5.) betting with persons resorting thereto.

I will discuss presently the rest of the section, and in discussing this part of it I will postpone for the moment all the words except "owner" or "occupier" in order to make clear what, in my view, is the substantial sense of the enactment. I will, of course, deal with the other words in detail, and par-

ticularly with the words "person using the same"; but let us first see what is the substance of the enactment. It prohibits opening a house, &c., for the purpose of the owner or occupier betting with persons resorting to the house so opened. It does not prohibit betting. It does not affect to deal with the betting of people unconnected with the house betting inter se; and it is obvious that unless some of the words which I have omitted can be held to enlarge the nature of the offence created by the words I have quoted, none of the facts proved shew the owner or occupier of the place in question to be betting or ready to bet with the persons resorting thereto. The owner or occupier has no interest in any bet, and is in no way concerned with any bet, and whatever may be the nature of the place, which to my mind is another question, the transactions described in the case are in no sense bets with the owner or occupier of the place in question. They are bets inter se by a great many people who resort to the place, but have, as I have said, no relation at all to the owner or occupier thereof.

This appears to me so plain that I think, but for the words "or person using the same," no question would ever have arisen, and it is material to see what these words import. It will be observed that these words occur as an alternative to the owner of the place — I supply the words "of the place" by necessary construction — the occupier of the place, the keeper of the place, or any person using the place: these are all put in one category. Then comes another enumeration of persons employed, and again language is exhausted to fix responsibility upon caretakers, managers, or other persons in any manner conducting the business thereof.

I think it is clear that what the statute is dealing with here is the case of persons who are in control and occupation of the place which is assumed to be the betting establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, and the business is that of a betting house or place to which people can resort for the purpose of betting, not with each other, but with the betting establishment.

It is the employment of the words "using the same" which to my mind has led to the difference of opinion. Those words,

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unless explained by the context, are necessarily ambiguous. In one sense every person who enters the inclosure uses it; but he does not use it in the character of owner, keeper, manager, or conductor of the business thereof. The betting man in his use of the place differs in this respect in no way from any other member of the public who enters it, and who neither does nor intends to bet. It is the personality of the betting man and not his being in any particular place which affords the opportunity of betting, and a man who walked along a public road shouting the odds in the way here described would be doing exactly the same thing.

It is nothing to the purpose that there are a great many of them who may be found in this inclosure; there is no business being conducted by a keeper, owner, &c., in the inclosure. Each betting man is himself conducting his own business of a betting man, and, as I have said, his betting is in no way connected with the place, except that he as well as other people not betting men are there.

It is here that I am unable to follow the reasoning of my noble and learned friends Lord Hobhouse and Lord Davey. They both, if they will forgive me for saying so, employ the word "use" in a double sense. My noble friend Lord Hobhouse admits the word "use" is ambiguous, and limits it by such words as "deliberate, designed, and repeated"; but to my mind these words miss the point. It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto.

My noble and learned friend Lord Davey gives as the prohibited purpose, "using," without any such qualification as I have been endeavouring to explain—using a house for the purpose of betting with persons who resort thereto. It is upon this point that I think the whole question turns, and I think here there is no such betting establishment at all as is aimed at by the Legislature, and no keeper, owner, &c., who bets with

any one. As I have said, I can understand no one of these bettors to be different from any other class of bettors. They do not in any sense own or keep the inclosure differently from the persons resorting thereto. In truth they are all persons resorting to this place, and the other class aimed at by the statute do not exist at all in these transactions. The man who takes the admission fee neither knows nor cares whether the man who pays for his admission bets or no.

I am not certain that I appreciate the distinction which I observe is sought to be drawn between what are called professional betting men and other men who bet. In respect of games which people play for amusement or pay, the distinction is intelligible enough; but all people who bet for money mean to win money, and whether it is for the sake of a living or for the sake of adding to money which the bettor already possesses seems to me an altogether illusory distinction.

The second part of the section is in strict accordance with what I have suggested as the meaning of the statute. It assumes a place or establishment for receiving money or some valuable thing being received by or on behalf of an owner, occupier, keeper, or person; here the statute uses the words "as aforesaid," that is "person using the same," for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise. Then every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place. In this view it is not an offence under this Act of Parliament

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to allow persons to assemble for the purpose of betting with each other; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual bettor, is conducting his own business, and doing it in a house used indeed, but only used, just as he might do it on the racecourse or on the high road. There is no betting establishment at all, and there is no keeper of one.

I do not think, therefore, that the important question is, what is a "place"? I think in this respect with Rigby L.J. that any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the statute. But I think not only that this is the construction of the words to which, of course, we must apply the meaning which the Legislature has intended, if we can find it out, but I think it is reasonable and in accordance with good sense that the words should be so construed and so limited. Every game, sport, or exercise is included in the section, and I suppose there is hardly any uncertain event which is of great public interest on which bets are not frequently made.

Take a boat-race. Every one who has a field, or garden, or house, or room and lets it for the day of the race may be perfectly certain that some of the people who go there, if they go in any considerable numbers, will bet, not indeed with the owner or occupier, &c., but with some one or more of the people who are there. Is each of such places a common gaming house, and subject to the provisions of the law recited in s. 2, and a common nuisance under s. 1? It seems to me that such a construction would subject a great many perfectly innocent people to great inconvenience and danger when they neither had nor intended to have any connection with betting houses or anything analogous to betting houses.

I have used the phrase "innocent people," by which I mean people who neither bet nor wish to bet; but it is obvious that the Legislature has not prohibited betting at all, but prohibited keeping a house for betting. I do not again go through the list of words which follow "house," because I have already sufficiently explained the construction I place upon them all.

It is not very obscure why the Legislature has used so many

words to express its meaning, and I have divided the words into five paragraphs to shew what has been the cause of this multitude of alternatives. Suppose the thing intended to be prohibited is what in my construction of the section it is, and suppose the Legislature had not provided for all the alternatives, and the section had run thus, "No house shall be kept for the purpose of the owner betting with persons resorting thereto": the Legislature of course had to provide for the place not fulfilling the legal meaning of a house; so follow the words, "office, room, or other place." It had to provide for any evasion of the word "kept"; so we have the words "opened, kept, or used."

Then, in like manner, the person betting is to be got at, whatever form he assumes, betting on behalf of the betting establishment; so we then get "owner," "occupier," "keeper," "person using." Then another evasion occurred to the mind of the draftsman, and he proceeds to deal with any person employed by or acting on behalf of the classes previously described, or any person having the care or management or in any manner conducting the business thereof; so that all through there must be a business conducted and a place so connected with that business that the person owning it is betting with the persons resorting thereto.

I do not think it is important to go through all the cases which have been brought before the Courts upon this subject, partly because so many of them have been decided on the special facts, which have not rendered it necessary to decide the exact question now before your Lordships, and partly because I think A. L. Smith L.J. has succeeded, in his luminous judgment, in shewing that no less than eight very learned judges have construed the statute in the way that it appears to me it should be construed, and the case now comes before your Lordships in a form that undoubtedly demands the decision in favour of one view or the other; but as the case of *Hawke* v. *Dunn* (1) is said to have given rise to this litigation, I wish to examine the grounds of that decision.

My Lords, I am unable to accept the reasoning in that case

(1) [1897] 1 Q. B. 579.

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(*Hawke* v. *Dunn* (1)), nor do I think it is consistent with the previous authorities or with itself.

In the first place, I find that reliance is placed upon the fact that the bookmakers who bet are professional bookmakers.

My Lords, I know of no canon of construction which can introduce such words into an Act of Parliament, and certainly there are no such words here. I cannot doubt that if the prohibited thing is done, whatever that prohibited thing is, by a person who does it for the first time in his life, he is just as amenable to the law as though he had been for many years in the practice of it. Let a man open a house for such a purpose, and though he never in fact made a bet or received a deposit, though the proof might be difficult, yet the offence, if proved, would be consummated.

At the end of the judgment I find these words: "The law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal, but what the Legislature has forbidden, and what it has pronounced to be illegal, is the use, *by those who make a trade and business of betting*, of any place for the purpose of betting with persons resorting thereto." My Lords, I will not again refer to the fallacious employment of the word "use"; what I at present insist upon is the selecting of such persons indicated by the words as if the Act of Parliament had made any difference between different classes of persons, and as if professional bettors were in any different position from any other members of the public.

In another part of the judgment I find the learned judge saying: "In my opinion to limit the meaning of the words 'other place' to some other place ejusdem generis with a house or office, would have the effect of defeating, not of forwarding, the object of the Legislature, and I cannot imagine that, with the desire to suppress that kind of betting mentioned in the preamble, it was in contemplation to afford it a kind of sanctuary in a betting ring or in any other place not ejusdem generis with a house or office." The mischief recited in the preamble is the opening of places called betting houses or offices, and the receiving money in advance by the owners or

(1) [1897] 1 Q. B. 579.

occupiers of such houses or offices, or by other persons acting on their behalf. The learned judge makes his meaning clear when he begins by saying that "one of the practices deemed to be objectionable and injurious was that of what is known as ready-money betting, viz., that the person making the bet deposited with the bookmaker the money which he was disposed to adventure." My Lords, this is again inserting by construction words which are not there; the words of the statute are "owners or occupiers of such houses or offices."

My Lords, I certainly should have thought that if this case were to be argued upon the preamble alone there was not much room for doubt; with the actual enacting words, however, I have myself endeavoured to deal.

The commentary on *Doggett* v. *Cattarns* (1) seems to suggest that a different thing is aimed at by s. 4 than that which is included in s. 2. I entirely agree with what Blackburn J. said on that case, but his question is, I think, applicable to the case now under discussion. I cannot suppose that the very same thing was not intended to be aimed at by all the sections, and the reasoning of the learned judge seems to assume that a different class of transactions was aimed at so that the decision of *Doggett* v. *Cattarns* (1) might be reconciled with the view that he himself entertains, upon the ground that the question did not arise upon s. 1 but upon s. 4. I am unable to concur with any such view. The offence, whatever it is, is created by ss. 1 and 2. The other sections in the Act apply as corollaries from the commission of the offence, and I think it would be impossible to reconcile *Doggett* v. *Cattarns* (1) with the view of the learned judge, by supposing that s. 4 is not ancillary to and forms but a new remedy in respect of the same class of transactions which are made the subject of penal enactment by ss. 1 and 2.

The analogy which the learned judge suggests between the statutes 42 Geo. 3, c. 119, 4 Geo. 4, c. 60, and the statute now under construction, is, I think, erroneous, and a careful consideration of those statutes would lead to an opposite conclusion. The words of the Act Geo. 3, c. 119, so far as they

(1) 19 C. B. (N.S.) 765; 34 L. J. (N.S.) C. P. 159.

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are relevant to the matter in hand, prohibited any person from keeping any "office or place" for lotteries, and an Act, which the learned judge does not seem to have noticed, namely, 59 Geo. 3, c. 65, actually recites that doubts had arisen in respect of the use of these words. The section in that Act (s. 57) is as follows: "And whereas doubts have arisen whether, under and by former Acts passed from time to time for granting to His Majesty a sum of money to be raised by lotteries, and the Acts commonly called 'Little Goe Acts' of the 27th year of His present Majesty, intituled 'An Act to render more effectual the Laws now in being for suppressing unlawful Lotteries,' and of the 42nd year of His present Majesty, intituled 'An Act to suppress certain games and Lotteries not authorized by Law,' the word 'place' mentioned in the said Acts respectively was meant to describe any place used for the purpose of drawing the illegal lottery called 'Little Goe' or for purposes of insurance in the lottery or 'Little Goe' or in anywise relating thereto, be the same an inclosed building or not; it is therefore hereby declared and enacted, that the word 'place,' when and where the same is mentioned and used in this and the said several above recited Acts relating to the drawing of the said illegal lottery called 'Little Goe,' or the assembling of persons for any of the illegal purposes mentioned therein, or for the purpose of 'Little Goe' or Lottery Insurance, shall be taken to extend to and mean any place in or out of an inclosed building or premises, whether upon land or water, where such illegal practices, or anything relating thereto, shall be carried on or attempted to be carried on."

So that, notwithstanding the width of the words, the Legislature found it necessary to explain, enact, and declare the meaning of the word "place." These form part of a collection of statutes establishing a monopoly by the Government for raising money by lotteries, and prohibiting every kind of lottery and every "place" for establishing any kind of lottery in words which are intended to be exhaustive. To apply such an analogy to such an Act as your Lordships are now considering, wherein it is admitted that neither betting nor professional

betting—if there be a difference—is prohibited at all, seems to me to be erroneous.

My Lords, if I have passed over the arguments relied upon by some of your Lordships in respect of the history of the legislation and the argument derived from the mischief which the preamble expressly recites to be the mischief against which the Act is directed, it is not that I differ from or undervalue the cogency of those arguments. I only desire to emphasise the proposition that I should come to the same conclusion as that to which I have arrived upon the language of the statute itself, if those arguments were not available to aid its construction.

For these reasons I think the appeal should be dismissed with costs, and I move your Lordships accordingly.

My Lords, I ought to add that my much lamented and distinguished friend Lord Herschell, who saw my judgment, concurred in the views which I have expressed. And, my Lords, I have a letter from my noble and learned friend the Lord Chancellor of Ireland saying that he also agrees with the judgment I have proposed to your Lordships.

LORD WATSON. My Lords, I am of the same opinion, and for substantially the same reasons which have already been expressed by my noble and learned friend the Lord Chancellor.

LORD HOBHOUSE. My Lords, in stating to the House the conclusions to which I have been drawn in this difficult case, I will endeavour as far as possible to avoid repetition of matters which have been frequently stated, though some repetition is necessary to make my remarks intelligible. I think that, often as disputes have arisen under the Betting Act of 1853, none has arisen exactly in the present form. In other cases there has either been a criminal charge or an action to recover money as the foundation of them. In the present case, a member of the company which owns the racecourse seeks to prevent the company from using its property in a way which in his view is forbidden by statute. Those sections, therefore, which are specially aimed at occupiers, managers, or persons filling other special characters, are not now directly called into action.

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They must be carefully considered as throwing light on the principal section which contains the prohibition to which they all refer and on which they all rest. But the part of the Act relied on for the injunction is the first and principal section, which declares in impersonal terms that no place shall be used for the purpose therein described.

The section is somewhat involved, and I am disposed to think that its involutions have caused some inaccuracy of language, or even of thought, in some passages of the many judgments cited to us. I will first pick out and arrange the material words applicable to the present discussion. After the preamble, s. 1 enacts: "(*a*) No house, office, room or other place (*b*) shall be opened, kept or used (*c*) for the purpose of the owner . . . . (*d*) or any person using the same . . . . (*e*) betting with persons resorting thereto." Taking the words of widest meaning, I read this as a declaration that no place shall be used for the purpose of the owner or (of) any person using the same (for) betting with persons resorting thereto. There is no question here about the owner using the place for betting with anybody. I have only inserted him into my skeleton sentence for the purpose of shewing how I read into it the prepositions "of" and "for" in heads (*c*), (*d*), and (*e*)—a reading which makes the grammar rather clearer, and, I think, will hardly be disputed. If then the company's reserved inclosure is a place used for the purpose of any person using it for betting with persons who resort to it, it is the thing prohibited; it is declared to be a common nuisance and contrary to law.

The precise nature and use of this inclosure is to be learned from the company's defence and from particulars of description put in by them. I will state what seem to me the material points. It is about a quarter of an acre in extent. It is uncovered, except that on the side furthest from the racecourse is the Grand Stand—namely, tiers of seats with a roof over them. All people are admitted to the racecourse on payment of 1*s.* or 2*s.* 6*d.*, according to the occasion. All people are admitted to the inclosure on such further payment as will make up 1*l.* The number of persons admitted on race-days varies from 500 to 2000. Among them are professional bookmakers,

varying from 100 to 200, having no special right there, and admitted only as other people are. Of the general public the greater number go there for the purpose of backing horses with bookmakers. A certain number do not bet at all. The bookmaker is accompanied by a clerk, who assists him in his transactions. He does not confine himself to any fixed spot, nor does he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same part of the inclosure. Some minor points are mentioned, and various modes of betting explained; but I do not think that much more light is thrown on the nature of the place than by the main incidents which I have mentioned.

We have it then that in this small space of a quarter of an acre there collect habitually on race-days a number of persons whose calling is to make bets with anybody who comes to them; that they may number 200, each with his clerk making 400 persons out of at most 2000, whose business is betting with the public; that they never fall short of 100, making, with clerks, 200 such persons; that the greater number of the other persons using the inclosure, who may be 500 or may be 2000 in the course of the day, go there for the purpose of doing business with these bookmakers; and that though they walk about, each of the bookmakers is usually to be found in the same part of the inclosure. Your Lordships are the judges of fact in this case. What inference can you draw, except that the inclosure is known to persons desirous of making bets as a place where they can at once find those who will gratify their desire; and that the business is regular and methodical, carried on in a defined area, which is small compared with the numbers who use it for betting, and in which each professional betting man can be at once found by anybody who wants him within a few yards of the spot on which he is accustomed to stand?

Applying the expressions of the statute to the facts, and taking the words in their ordinary and reasonable sense, it seems to me impossible to deny that the inclosure is a "place kept" (by the company) and "used" (by them) "for the purpose of persons" (bookmakers) "using the same for the purpose

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of betting with persons resorting thereto" (i.e. with that larger number of the public who go for the sake of betting with them), or, conversely, that it is kept and used by the company for the purpose of that greater number of the public using it for betting with the bookmakers who resort to it. The words appear to me to describe the case of this inclosure so readily and fitly, that it is incumbent on the company, who deny that the use is illegal, to adduce very strong reasons for holding that the words are used in some sense much more restricted than the sense which they are calculated to bear according to the ordinary use of language. That they undertake to do by an examination of the rest of the statute.

It is said that some limitation must be placed on the generality of the words, for otherwise, seeing that betting, like every other human action, must be in some place or other, which for the moment would be used for that purpose, it would result that all betting would be prohibited. That is a thing which the Legislature has never attempted. In the year 1845 it was enacted that a bet should not be the basis of a contract as it used formerly to be; but it remains a perfectly legal act. That argument is repeated many times in various forms of language, and to shew precisely what it is I cannot do better than read a passage from the weighty judgment of the present Master of the Rolls: "No person can bet except in some place or other, and, whenever he bets in any place, he uses that place for betting. To construe 'other place' or 'place' in its ordinary sense of any and every place where persons can or do bet, would involve an absolute prohibition of betting, and would have rendered it quite unnecessary to specify 'betting houses, rooms or offices.' But the Legislature clearly did not intend to prohibit, and has not prohibited, all betting, nor even all betting by persons who deposit their stakes. Some limitation must therefore be put on the expression 'other place' or 'place.'"

Now, speaking with great deference to so clear an intellect, I cannot help thinking that the argument would not have been put in this way if it had not been for the involved structure of s. 1, or if the sentence had been kept, as it were, displayed

before the eyes of the commentator. The ordinary sense of "place" is not to mean any and every place where persons can bet. The ordinary sense is a portion of space, and as applied to the earth we live on, a portion of that earth. But the moment the idea of betting is introduced, other words of s. 1 come into play. The Legislature has not left us to deal with "place" in vacuo or in the abstract. It has joined other words, and so, as I think, carefully described and confined the meaning of "place." If the practice complained of is that of the owner, occupier, manager, or persons in like position, the meaning is confined within a very narrow compass. In the case before us we have a wider range given by the word "persons." Still there is a qualification of the word "place," and it is one which seems to my understanding to be reasonable, intelligible, and definite enough to ascertain and to apply to the facts of each case. To fall within s. 1 the place must be one used for the purpose of any one using the same for betting with persons resorting thereto. That is true of only a very limited number of places. We have not to construe the word "place" but the compound term "place-used-for-the-purpose." I agree that we must consider the meaning of the word "used" and the meaning of the word "purpose," but if we find that when those words are interpreted in senses germane to the subject-matter, and in accordance with common usage they give a reasonable limitation of the word "place," why should we quit the safe ground of the statutory words and go about seeking for limitations of our own, which must be conjectural?

The most common limitation imposed on the generality of the word "place" by those who think it needs more limitation than is supplied by the words immediately connected with it is, that it must be akin, ejusdem generis, with its companions, "house, office, room." If the genus selected is wide enough in range, I agree; but that does not go far to solve the problem. That it must mean something other than a house, office, or room the words compel us to admit, and I think nobody denies it. To find out what it means that is not a house, office, or room, and is yet in the view of the law-makers of the same

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nature, the statute itself is our guide; not in sidelong, indirect lights thrown by other sections addressed to other parts of the subject, but in the express words of this section, which are directly addressed to the very root of the subject. If another place is definite enough in area for identification, if it enables its users to carry on their business as a house, office, or room would do, and if the use of it produces the same results to betting people as a house, office, or room would do, it is of the same genus or nature as a house, office, or room, and it is struck at by the Act. And I think that is the kind of place which is designated by the expression indissolubly linked with it, "place-used-for-the-purpose"; and that the other limitations which have been suggested to exclude such places as this inclosure are not warranted by the terms of s. 1, and are not called for by any fear of unreasonable consequences. With these remarks on the insufficiency, as I think it, of the criticisms on the word "place" separated from the context from which the statute never separates it, I pass on to examine the words of qualification used in the statute.

The place must be used for a purpose before it can fall within the prohibition. The word "used" is almost as wide in range as the word "place." It may be applied to most human actions. But to use a thing for a purpose is an expression with a much more limited range, and the nature of the purpose will confine it within narrower limits still. If I walk along Whitehall I may be said to use Whitehall, but if I blow my nose there, and thereupon any one were to say that I was using Whitehall for the purpose of blowing my nose that would be a misuse of language to which either casual hearers or students of language would object. The phrase "use-for-a-purpose" necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand. Again, if a snarling dog approaches me, and I take up one of the stones on the road to fling at him, it is not incorrect, though the user be momentary, to say that I have used the stone for the purpose of flinging it at a dog. But it would be very incorrect to say that the stones on the road are kept or used for the purpose of persons using them for flinging at dogs. The expressions, I

think, necessarily, or at least very strongly, import an habitual or repeated use of the thing for the purpose.

If then we read the statute as striking at places the use of which for the purpose of betting is deliberate, designed, and repeated, either on the part of the owner or person having the control, or on the part of other persons using the same, we shall, as I conceive, give to its words their plain and ordinary meaning, and we shall not give to it any extravagant latitude such as has been suggested.

I do not propose to take up the time of the House by a minute examination of cases which have been examined often and minutely by others. I think that very little, if any, authority can be produced against the reading which I have tried to expound, and that many judicial opinions may be cited which favour it. But I should like to illustrate it by reference to cases which seem to me to mark neatly the boundaries between legal and illegal use of a place for betting. There are two cases, in each of which the bar or tap-room of a public-house was used for betting. In each case betting took place in the bar. In *Whitehurst* v. *Fincher* (1) the defendant was the betting man. He went into the bar on three consecutive days and made some bets. He was not a bookmaker. It was held that the room was not used for the purpose. In fact, the defendant came in, and being there made bets, but there was no designed or systematic use of that place. In *Hornsby* v. *Raggett* (2) the defendant was the occupier, whose room was used by a bookmaker systematically for his business, and the defendant was convicted. The judges who decided the former case were Mathew J. and Fry L.J., and those who decided the latter were Mathew J. and Mr. Justice, now Lord Justice, A. L. Smith. And with *Hornsby* v. *Raggett* (2) agrees *Reg.* v. *Preedy* (3), decided by Hawkins J., where the place was the bar of a public-house, to which the defendants resorted on several days for making bets. In none of these cases did the Court allow the objection that the betting men had no right to use the place; or that it was used at the same time by other

(1) (1890) 17 Cox, C. C. 70. (2) [1892] 1 Q. B. 20.
(3) 17 Cox, C. C. 433.

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persons for its legitimate purpose of a tap- or bar-room; or that no particular part of the room was allotted for betting. The decisions turned on the essential question whether or no the evidence shewed that the room was used for the purpose of a person using the same for betting with persons resorting thereto. And for ascertaining the purpose the leading consideration was whether the use of the room was casual or systematic.

For the same purpose I compare the cases of *Reg.* v. *Cook* (1) and *Snow* v. *Hill* (2), on the one hand, with *Hawke* v. *Dunn* (3) on the other hand. In the first of those three cases the place was a bicycle-ground, ten acres in extent. There were 20,000 spectators. Though no betting was allowed, some actually took place. The manager of the ground was convicted by the magistrates, but the conviction was quashed by the Court, consisting of Hawkins J. and Smith L.J. The facts shewed, said Hawkins J., that betting was not the business of the place. So in *Snow* v. *Hill* (2) the place was an inclosed field, five acres in extent, used for dog-races. The defendant, who was convicted by the magistrates, moved about this field making bets. Lord Coleridge and Smith L.J. were the judges. They quashed the conviction. It appears from the judgment which the latter learned judge delivered in the present suit, that the precise ground of the decision was that the defendant walked about and did not use any definite spot; not, as had been supposed, that he was not shewn to have been a professional bookmaker. But in that case there was no other spot capable of definition except the whole field, and it was not shewn that the field was crowded with betting men, or could reasonably be said to be used for the purpose of betting, or for any purpose other than its ostensible one of dog-racing. In both these cases the question really tried was whether a defined place was used for the purpose forbidden by the statute. In *Hawke* v. *Dunn* (3) the same question was tried. The defendant was a bookmaker, the place was an inclosure, within a racecourse, called "Tattersall's Ring." On the day in question about 1000 persons were

(1) 13 Q. B. D. 377. (2) 14 Q. B. D. 588.
(3) [1897] 1 Q. B. 579.

admitted to the inclosure, including the defendant and fourteen other bookmakers, with their clerks. That is a much smaller proportion of bookmakers than exist in the present case; but as regards the size of the place and the habitual use of it, that case strongly resembled the present one. The magistrates refused to convict the defendant of using the inclosure for the forbidden purpose, but on appeal a conviction was obtained. Hawkins J. delivered the opinion of the Court of five judges, who were unanimous. He laid it down that the user forbidden is the user by those who make a trade or business of betting. And what the judges found is that the facts proved, namely, the definite area, the large number of betting men resorting to it for betting, the habitual use of it, and the calling of the defendant, combined to shew that the inclosure was a place used for the forbidden purpose.

Here let me make a remark on a point which has entered into the discussion of the six cases I have quoted, namely, whether or no the persons betting were professional bookmakers. It was pointed out more than once at the bar, and has been again pointed out by the Lord Chancellor, that the statute does not single out bookmakers as objects to strike at. That is quite true, and yet it remains that the character of the persons who commonly use the place is a relevant and important fact. The crucial question being whether the particular place in dispute is a "place-used-for-the-purpose," surely the fact that it is habitually used by persons who make betting the business of their lives is an important ingredient of evidence for ascertaining the purpose. I have not mentioned it with any other object, and I think it is with the same object that other judges have dwelt upon it.

I think that the six cases which I have mentioned are all well decided, though of course I am aware that the suit before your Lordships is intended to be and is in effect a rehearing of *Hawke* v. *Dunn*. (1) Different judges used different terms in expressing their opinions; but in each of these six cases the real controversy has been whether there is a reasonably defined area designedly and repeatedly used for the purpose of betting

(1) [1897] 1 Q. B. 579.

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with persons resorting thereto. If so, that is a forbidden place within s. 1, and the question who is liable to penalties depends on other sections of the Act.

Of course there will be difficult cases in which it is doubtful whether they fall on one side or the other of the dividing line between legality and illegality, whatever line may be drawn. In deciding whether a place is used for a purpose, the size of the place, its more or less marked division from other places, the proportions between those who come for the purpose in question and those who come for other purposes, the regularity or frequency of the use, all such things must enter into the consideration, and may cause much difficulty. For myself, I cannot feel substantial difficulty in the six decisions I have quoted. And yet I know there is difficulty, such difficulty as to produce dissent from *Hawke* v. *Dunn* (1) in the Court of Appeal, and among most of your Lordships. How far that difficulty will affect other decisions I hardly know, but unless it is rested on some grounds peculiar to inclosures on racecourses it will shake many other decisions. I think that some of the other decided cases are on the face of them open to question. In *Eastwood* v. *Miller* (2) I should have doubted whether the ground could properly be said to be a place used for the purpose of any person using the same for betting with persons resorting thereto, seeing that the only place was a large field used for other purposes by largely preponderating numbers of persons. In *Haigh* v. *Sheffield* (3) the same doubts occur. But in the case of *Hawke* v. *Dunn* (1), as in the present case, the statutory expressions are fitted exactly to the facts, and we can hardly say that there is difficulty, if these expressions are to receive their obvious and ordinary sense, and are not to be cut down on account of expressions in other sections, or because it is thought that such places as inclosures on racecourses are wholly beyond the scope of the enactment.

The latter of these suggestions is founded mainly on the preamble, which recites as the motive for the new law that a kind of gaming has "of late" sprung up. It goes on to

(1) [1897] 1 Q. B. 579. (2) L. R. 9 Q. B. 440.
(3) L. R. 10 Q. B. 102.

mention specifically the opening of places called betting houses or offices, and the receiving of money in advance for bets, which I believe is called ready-money betting. "For the suppression thereof" it is enacted; and then commences s. 1. There is nothing to explain what period of time is comprised in the vague words "of late," nor whether the later phenomena are the opening of betting houses and offices simply, or, as the grammar would indicate, that opening combined with ready-money betting; nor why ready-money betting, which requires possession and payment of cash by the offerer of the bet, is more demoralising than ordinary betting, in which he may go to any extent beyond his means on the chance of winning and never having to put down any money at all. Looking at the preamble alone, I say for myself that it does not give me any idea of the precise mischief which the Legislature is resolving to suppress, except that it has something to do with betting, and that I have to look at the enacting part to find out what it is. That is not the sort of preamble which can be used with any confidence to control expressions in the enacting part, even were they less clear than those of s. 1. At any rate, that s. 1 is more precise than the preamble, and does go beyond it in several particulars, is allowed by everybody who has commented on it; and I need not dwell more upon that point.

But it is stated that the practice of betting in racecourse inclosures prevailed long before the year 1853, and that in some cases it is traceable as far back as the beginning of this century. My Lords, some very pertinent remarks on this statement were made in the Court of Appeal by Rigby L.J., which I will not repeat (they begin at p. 73 of the Appendix (1)) but will beg to adopt, as shewing that statements of this kind, though unquestionably made in perfect good faith, must be received with great caution. They relate to matters of history beyond the personal knowledge of the parties who make them; they have not been subjected to close investigation; and in order to have any important bearing on this discussion the facts stated must not only be a full account of the whole case, but must have been present to the minds of the

(1) See [1897] 2 Q. B. 291.

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framers of this statute. The ground is a very unsafe one to build upon.

But let us see exactly what the argument is. It is, I understand, that if the Legislature had intended to prohibit such well-known practices, it would have used more express words pointed to that end. The argument was very well and forcibly put, and I confess that for some time I came under its influence. But after all its force depends on the extent to which it is thought that the terms of s. 1 require judicial limitation narrower than the limitation which they themselves import when read in their ordinary sense. By repeated study of those terms I have persuaded myself, and have been at pains to shew, that this ordinary sense of the terms leads to a reasonable and clear comprehension of the mischief at which the Legislature has struck. To any mind which has arrived at that conclusion the force of the argument founded on notorious existing practice is turned in the opposite direction. Why, if racecourse inclosures were not struck at, should the Legislature have chosen terms which fit this inclosure, and, therefore, ex-hypothesi the older inclosures with close exactitude, and yet make no exception in their favour? Suppose it were shewn that systematic betting went on in public-houses long before 1853. It would be very surprising if it did not, and probably it could be shewn if anybody were interested enough in the matter to make inquiry. Public-houses are not mentioned in the Act any more than racecourse inclosures. Their bar-rooms are subject to precisely the same inquiries as regards defined area, user, and purpose as are racecourse inclosures. It has been found in several cases that the terms of s. 1 aptly describe parts of bar-rooms frequented by ordinary customers, but also frequented by betting men. It is difficult to think that those decisions should be overturned if reasons were assigned for believing that the practices condemned by them were too old to fall within the very vague terms "of late sprung up," and that the Legislature could not have intended to prohibit practices then long known.

It is true that many years have elapsed before applying the Betting Act to places of the kind now in question. If the

meaning of the descriptive terms were so ambiguous as to hold the mind in equilibrio between two rival constructions, one might resort to this consideration for aid. But I cannot admit it to import an ambiguity into terms which I find substantially clear. It is of no great weight. In this country we are in the habit of leaving many kinds of prosecutions to be set agoing by private persons, and the result is an irregular application of the law. Whether private persons shall invoke a law to suppress practices which they dislike depends on many circumstances affecting their minds; perhaps the most powerful incitement would be an extension of the practices themselves, and of the feelings roused against them.

This irregularity is most marked when the law has placed in the category of crime practices which large numbers of persons think to be vicious, and large numbers again think to be harmless, and carry on without any loss of self-respect or of the respect of their neighbours; and such I take to be the case with betting. I could mention other statutes, e.g., those relating to the observance of Sunday, and those relating to lotteries, which have been applied in unexpected ways after a long time. But I will avoid these speculations. It is sufficient to say that if this statute is invoked it must be rightly construed, whether its long sleep has been due to lack of interest, or of courage, or to ignorance, or to any other cause.

There are, it is true, expressions and provisions in the statute on which arguments may be built for restriction of the terms of s. 1. I will refer to a sentence or two in the judgment of the present Master of the Rolls, because, by collecting those passages of the statute together, he presents a condensed and forcible statement of the argument founded on them. They occupy the first half of p. 45 of the Appendix. He first refers to the preamble which I have dealt with at length. The place aimed at by the Legislature, he says, is a place where the business of betting is carried on (ss. 1, 3, 4). Well, that is the main object of this inclosure. It is a place used as a betting house or office, which can be forcibly entered under the warrant of a magistrate (ss. 11, 12). This inclosure is used by the great majority of persons who use it at all, both in form and

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substance, just as a betting house or office is used, and it can be forcibly entered by the officers of the law. It is a place which can be advertised as a betting place (s. 7); so can this inclosure, though in fact it is not. It is a place which can be reasonably regarded as a common nuisance (s. 1); so can this inclosure. If the practice objected to were an orgie, offensive to the moral sense, nobody would think that it was not a nuisance, or that there was any absurdity or practical difficulty in treating it as a nuisance, and the Legislature has chosen to place the specified mischief on the footing of a nuisance.

So far, I see no difficulty in applying the provisions of the statute to the inclosure. But then stress is laid on this: that it must be a place which it is not absurd to treat as a gaming-house within 8 & 9 Vict. c. 109 (ss. 2, 11, 12). That provision, I admit, causes difficulty; and it is the only one of the subordinate provisions which does. It would be somewhat astonishing if persons entering the inclosure for curiosity only, or amusement, found themselves arrested for being in a gaming-house. I cannot find, however, that this consideration has prevented the Courts from holding places under like conditions to be within s. 1. It would be absurd, in some respects, to treat the spots occupied by a desk, an umbrella, or a box as gaming-houses; but that did not prevent decisions that they were within s. 1, and I have not heard any objection taken to those decisions. It would be very hard if a man going to enjoy a pot of beer in Preedy's bar (1) had been arrested for being in a gaming-house, yet Preedy's case and the other public-house cases involved such a consequence as much as *Hawke* v. *Dunn* (2), or as this case. I do not know that they are to be overruled, and I certainly do not think that they ought to be.

In the recent case of *Liddell* v. *Lofthouse* (3) all the consequences apprehended in this case might have followed. The place was a billsticker's hoarding, supported at two points by stays of timber, and quite open in front. This formed between the supports a convenient protected bay for a betting man, who posted himself there for three consecutive days to bet with all

(1) 17 Cox, C. C. 433. (2) [1897] 1 Q. B. 579.
(3) [1896] 1 Q. B. 295.

comers. He was convicted by Lindley and Kay L.JJ. of using the place for the forbidden purpose. Yet not only was the place uninclosed, but in front it was undefined by any boundary, and any innocent passer-by who stopped for a while to look on might, according to the argument now under examination, be arrested for being in a gaming-house. Lindley L.J. says: "The place is sufficiently defined for all purposes. As to its being partly undefined, I think there are many places, which though in some sense undefined, can yet be described with sufficient clearness for the purpose of identification." I entirely agree; but I add that in all such places there may be, and in many there are sure to be, persons not engaged in the betting. I do not remember that this decision was objected to in the argument here, and in the Court of Appeal it was referred to by several judges with apparent approval.

I think this difficulty shrinks in magnitude under examination. It really arises from carelessness in importing the provisions of another statute into a new range of subjects; and that the words "other place" bring in a larger range is not denied by anybody; the only dispute is, how much larger. Then the draftsman does not observe that some of the subordinate provisions of the imported statute may not be applicable to everything which falls within the larger range. The arrest of persons not actually engaged in the betting is a thing most unlikely to happen; and it does not appear ever to have happened in fact. I cannot think it right to cut down clear words of enactment in the leading section because one of the subordinate provisions may involve a remote possibility of this kind. It is hardly legitimate to allow so small a part of the Act to influence its essential scope so largely.

To sum up briefly what I fear has been a tedious argument, I find a place definitely demarcated, of small size compared with its occupants, regularly frequented by large numbers of professional bookmakers carrying on their business of betting in the most methodical manner with persons who come there for that purpose. A "certain number," it is said, do not bet at all; but the greater number of the public go for the purpose of betting with the bookmakers. I agree that the Act is directed

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not against betting, but against bookmakers and those who make a business of betting: *Liddell* v. *Lofthouse*. (1) But I say that the mode of warfare adopted against such persons is to strike at places where betting is concentrated into a focus, so that persons wishing to bet may know exactly where to find those who will indulge them. Wisely or unwisely, the Legislature has decided that such practices are vicious, "tending to the injury and demoralisation of improvident persons." Wisely or unwisely, the Legislature has thought it possible and desirable to repress these vicious practices by branding them as crimes. It has declared that places used for such practices are common nuisances and contrary to law. If we are to rely on admitted facts, this inclosure is a concentrated focus of betting as regular as the races themselves, and it is thronged by betting men, professional and other, with only a moderate sprinkling of men not engaged in betting. If there is any meaning in words, that is a place kept and used for the purpose of persons using the same betting with persons resorting thereto. Those are the guiding terms of the Act, and I do not think that their meaning can rightly be cut down by anything in the vague preamble or in the subordinate provisions.

In my judgment, therefore, the decision in *Hawke* v. *Dunn* (2) is right, and so is the decision which the Lord Chief Justice delivered in this case in deference to *Hawke* v. *Dunn*. (2) Knowing that the majority of your Lordships are of a different opinion, I make no motion. But having myself arrived from a state of great doubt to a clear conclusion, I have thought it right to state the reasons why I differ from so great a weight of authority.

LORD MACNAGHTEN. My Lords, I concur in the motion proposed by the Lord Chancellor.

LORD MORRIS. My Lords, I also agree.

LORD SHAND. My Lords, I also am of the same opinion, and in addition I only desire to express my view that if the

(1) [1896] 1 Q. B. 295. (2) [1897] 1 Q. B. 579.

language of the words of enactment in the statute were open to the observation that they are ambiguous and so are open to two different views or constructions, which I do not think they are, yet I am strongly of opinion that the terms of the preamble are so clear as to the object and intended scope of the statute that the judgment, even in that view, must be given in favour of the respondents.

LORD DAVEY. My Lords, this case is chiefly remarkable for the great divergence of judicial opinion on the question involved in it. On the one hand we have the opinions of Hawkins, Cave, Wills, Wright, and Kennedy JJ. in *Hawke* v. *Dunn* (1), and those of Rigby L.J. in the present case, in favour of the appellant's view; while on the other hand Lord Esher, the present Master of the Rolls, and Lopes L.J. (now Lord Ludlow), and Smith and Chitty L.JJ., support the respondents' contention, and it is tolerably clear that the opinion of the Lord Chief Justice was in the same direction. If we turn to the older decisions it is admitted that *Eastwood* v. *Miller* (2), and (I think) *Haigh* v. *Town Council of Sheffield* (3) and *Liddell* v. *Lofthouse* (4), cannot stand with the decision of the Court of Appeal. We have also the valuable opinion of Erle C.J. and Archibald J. on the construction of the Act in *Doggett* v. *Cattarns* (5), and it is somewhat difficult to make out the exact grounds on which their decision was overruled in the Exchequer Chamber. (6) For reasons which will presently appear, I think that the distinction sought to be made in *Bows* v. *Fenwick* (7) and *Gallaway* v. *Maries* (8), that the betting man or bookmaker (as he is called) in one case stood on a stool under an umbrella and in the other case on a box, is too thin to be a ground for decision.

In this divergence of judicial opinion I find it the better and safer course to examine the words of the Act itself and endeavour to form my own opinion on the construction of the

(1) [1897] 1 Q. B. 579.
(2) L. R. 9 Q. B. 440.
(3) L. R. 10 Q. B. 102.
(4) [1896] 1 Q. B. 295.
(5) 17 C. B. (N.S.) 669.
(6) 19 C. B. (N.S.) 765.
(7) L. R. 9 C. P. 339.
(8) (1881) 8 Q. B. D. 275.

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Act as applied to the admitted facts of the present case, as if the matter were res integra and there were no previous decision upon it.

Turning, therefore, to the Act, the first thing to be noted is the preamble, to which great and, as I think, undue importance has been attached by some of the learned judges in the Court of Appeal. Your Lordships must forgive me if I read the words of it: "Whereas a kind of gaming has of late sprung up leading to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races, and the like contingencies; For the suppression thereof" (i.e., of the kind of gaming described) "Be it enacted," &c.

It has been said that inasmuch as betting transactions of the same character as those which take place in this inclosure have been carried on in similar inclosures throughout the country from the beginning of the century, it is inconceivable that these practices should have been unknown to the Legislature when it passed the Act of 1853, and if it had been intended to suppress them direct or unmistakable words would have been found in the Act. Your Lordships have before you in the appellant's case (the accuracy of which was admitted by the learned counsel for the respondents in the course of the argument) a more detailed statement of the facts on this point than was unfortunately before the Court of Appeal. That statement is to the effect that although inclosed spaces had been in existence at race-meetings prior to the passing of the Act for the purpose of betting, yet prior to that time the betting was for the most part credit betting, and ready-money betting only occasionally took place, and to a small extent. I think, therefore, that the argument I have referred to is founded on an exaggeration of the facts as now disclosed; but, further, I am of opinion that the argument itself is illegitimate if it is sought thereby to cut down the language of the enactment according to its plain and natural meaning, or to restrict

the enactment to the particular matter set forth in the preamble. "Undoubtedly"—I quote from Chitty L.J.'s judgment words with which I cordially agree—"it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms." But the preamble is a key to the statute, and affords a clue to the scope of the statute when the words construed by themselves without the aid of the preamble are fairly capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature. It may well be in this and in other cases that the Legislature, taking the recited facts as the occasion of the enactment, has deliberately used larger words to prevent the same kind of mischief in other forms. In the present case I am bound to express my opinion, with unfeigned respect for those who think otherwise, that there is not any such ambiguity in the present Act as entitles a court to cut down or restrict the words of the enactment by the recital in the preamble.

I have said thus much about the preamble because I dissent from many of the arguments which have been used, and the question is one of general interest. But in truth it is not essential to my opinion in this case, because I am prepared to accept the construction put upon the word "place" by the learned counsel for the respondents.

To turn now to the enactments themselves, and reading only what is material to explain my construction, s. 1 provides that no house, office, room, or other place shall be opened, kept, or used for the purpose of any person using the same or conducting the business thereof betting with persons resorting thereto, or for the purpose of receiving deposits in the manner which has been shortly described as ready-money betting. Sect. 3 enacts that any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used

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by any other person for the purposes aforesaid or either of them, or any person conducting the business of any house, &c., used for the purposes aforesaid, shall be liable to penalties. The present case falls within s. 3, and the important words are "opened, kept, or used." I think that the word "used" must mean something different from "opened" or "kept," and be intended to enlarge the scope of the enactment; and the person who uses is clearly of a different genus from the occupier who permits the user. I cannot find any sufficient reason for not attaching its ordinary meaning to the word "used," which is not a difficult word to construe. Indeed, I have had some difficulty in understanding in what other sense the word is said to be employed, or grasping the meaning sought to be attached to it.

It will be seen that the prohibited purposes are twofold: (1.) using a house, &c., for the purpose of betting with persons resorting thereto, and (2.) receiving deposits on bets. I have already said that for the purposes of this case I accept Mr. Walton's contention that the word "place" should be construed as ejusdem generis with house, room, or office. I will take it to mean any inclosed space capable of being used and in fact used by persons carrying on the business of betting with others as their office or place of business for the time being. The questions therefore are: Was this inclosure a place capable of being so used; was it, in fact, used for the purposes mentioned in the first section of the Act, and did the respondents wilfully permit it to be so used?

The inclosure in the present case is a piece of ground of not more than a quarter of an acre in extent, fenced off and inclosed by iron railings. We have not, therefore, to consider any questions such as those raised in *Doggett* v. *Cattarns* (1), whether a tree in Hyde Park could be a place within the meaning of the Act, or those suggested in the course of the argument whether a racecourse could be a place. It is an inclosed, segregated space of comparatively moderate dimensions, and it was scarcely denied that it is capable of being a "place" within any construction of that word.

(1) 17 C. B. (N.S.) 669.

The number of persons admitted to this inclosure varies from 500 to 2000, and among such persons there are always a certain number, varying from 100 to 200, who are professional bookmakers "carrying on their business" (I use the language of the amended particulars) in the manner described. Of the other members of the public frequenting the inclosure the greater number go there for the purpose of "backing" horses with the bookmakers, but a certain number do not bet at all. They go there, I suppose, from curiosity or in company with their friends, or perhaps even (though the situation does not seem very eligible for obtaining a quiet view) to see the race. The bookmaker in the inclosure is accompanied by his clerk or partner with the necessary book for recording his transactions. He does not confine himself to any fixed spot in the inclosure, nor does he use any such apparatus as a desk, stool, or umbrella, though any particular bookmaker is usually to be found in or near the same part of the inclosure. The amended particulars then describe the mode of betting adopted by the bookmakers. To put it shortly, the practice is for the members of the public who bet with them to back a particular horse against the "field," whilst the bookmaker backs the "field" against the particular horse selected. A bookmaker anxious to back the field against a particular horse calls out the odds which he will give or take in respect of those horses, and this practice of calling out the odds is largely adopted by every bookmaker betting in the inclosure for the purpose of attracting the attention of backers. Some bookmakers carry on a ready-money business, (that is) usually require the backer to deposit his stake when the bet is made. Others do the greater part of their business on credit (that is) without requiring a deposit. But, as might be expected, a deposit is required when a bet is made with a person unknown to them.

On this statement of facts, my Lords, I cannot bring myself to doubt that the reserved inclosure is a place in the nature of a room which is in fact used by professional betting men as their place of business for the time being, or, if you will, temporary office, for both the purposes mentioned in the 1st section of the Act, namely, for the purpose of betting with persons

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resorting thereto, and for the purpose of money being received by them in consideration of a promise to pay money on the contingency of a horse-race. In my opinion the provisions of the Act are infringed if a person carries on his business in the manner prohibited by the Act in some known room or place to which people who come to bet with him can resort, knowing that they will find him there. There is nothing whatever in the Act which requires that the occupation or user of the place for the prohibited purposes shall be exclusive, or that the person using the place shall have a right of occupation of any defined portion of it. And I regard it as altogether immaterial that the bookmakers do not stand on a stool or box, or use a gaudy umbrella for the purpose of rendering themselves more conspicuous or attracting the attention of their customers. Those are accessories which may afford useful evidence when the nature of the business is in doubt, but are not essential to the carrying on of the business. Then it is said that the bookmakers pay the same fee for admission as the other members of the public, and have no more right there than others who have paid the same fee. I am unable to see the relevance of this. The question is, not how they get there, but what they are permitted to do when they have got there. In short, it seems to me, on the admitted facts of this case, that this inclosure is a species of betting-room or exchange to which professional betting men go for the purpose of pursuing their calling, and which their customers resort to, knowing they will find them there and be able to deal with them. I adopt the judgment of the present Master of the Rolls in the Stockton case (*Liddell* v. *Lofthouse* (1)), which seems to me a more difficult one than the one before your Lordships.

It is not in controversy that the respondents knowingly permit the inclosure to be used by betting men in the manner described, and, inasmuch as it does not appear that any other part of the land under their control is used for the same purpose, I should have little difficulty in inferring, if it were necessary, that the reserved inclosure is appropriated by them for that purpose. I have a strong suspicion that they would not

(1) [1896] 1 Q. B. 295.

permit the betting men to carry on their business on the Grand Stand or any other part of their adjoining land or buildings. But it is not so found in the present case, and I have no right to assume it, nor is it necessary for the purpose of this case. It is sufficient to say that the bookmakers are licensed or permitted by the respondents to use this particular place for the purposes of their business.

Some of the learned judges have thought it inconceivable that the Legislature can have intended to prohibit the use of an inclosure like the one in question for the purposes detailed in the amended particulars. I have a greater difficulty in understanding why, under the provisions of an Act directed to the suppression of a particular kind of gaming, a person should be allowed to transfer his business for the day or more to an inclosure in Kempton Park and carry it on there in precisely the same manner which he could not do in his own office in London or elsewhere. I do not think that any serious difficulty is created by the inclosure being liable to be treated as a common gaming-house, with the consequences thereof. Persons who resort to this inclosure must know what they are about. And it is admitted that the majority of people who go there do so for the purpose of betting.

For these reasons I agree with the judgment of Rigby L.J. and with my noble and learned friend Lord Hobhouse that the judgment of the Court of Appeal should be reversed. But as the majority of your Lordships are of a different opinion, the appeal will, of course, be dismissed with costs.

LORD JAMES OF HEREFORD. My Lords, I desire to say that it appears to me that this action was duly brought in the Court below.

The leading counsel for the appellant, in the commencement of his argument, very properly called your Lordships' attention to the fact that the action was in one sense a friendly action—a fact of which the Courts below had also been informed. It appears that by a decision in the case of *Hawke* v. *Dunn* (1) the proceedings permitted by the defendants at Kempton Park

(1) [1897] 1 Q. B. 579.

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would be regarded as illegal. From that decision there could be no appeal. Shareholders in the defendants' company were therefore interested in obtaining the decision of the Court of Appeal and of this House upon the matters involved. To effect this object the plaintiff, one of the shareholders in the defendants' company, brought this action in a form which would secure a judgment upon the legality or illegality of the defendants' proceedings. It seems clear that the action was brought in good faith for the purpose of obtaining an authoritative and final judgment. Probably the plaintiff will regard with satisfaction his want of success in the action. But the judgment, whatever it may be, will and must be acted upon. This, therefore, is not a case where the judgment of a judicial tribunal is sought for the purpose of determining a right for mere abstract purposes.

It also seems quite clear that there is no ground for saying that any collusion has existed between the plaintiff and defendants or their legal advisers. The statements made by Mr. Asquith and the late Sir Frank Lockwood are conclusive upon that point. In the course of his reply at the Bar of the House Mr. Asquith stated that he had acted as leading counsel for the plaintiff in the case of *Hawke* v. *Dunn* (1), and had argued successfully in that case that facts similar to those existing in the present suit constituted illegality. Not the slightest trace can be found throughout the whole of these proceedings of any want of good faith or zeal on the part of plaintiff or his advisers in the conduct of the suit.

It was stated by the leading counsel for the appellant that a somewhat too broad admission was alleged to have been made in the 10th "particular," wherein it was stated that at the time of the passing of the Betting House Act, 1853, betting was carried on, and had been carried on since the commencement of the century, in certain inclosures in precisely the same manner as now existing. In my judgment this allegation is immaterial, and cannot in any degree affect the decision that should be arrived at on this appeal. But even if it were material the alleged inaccuracy has now been plainly corrected

(1) [1897] 1 Q. B. 579.

by the statements made in the 10th paragraph of the appellant's case. Such statements, admittedly correct, are now accepted without reference to the allegations in the 10th "particular." The decision of your Lordships will, therefore, proceed upon the statement of fact that some ready-money betting had existed on racecourses prior to 1853, but in less degree than that which has occurred since.

Inasmuch therefore, as it seems that this action has not been brought to try any abstract question, that the judgment of this House is sought for the purpose of being enforced and acted upon, and that the action which has been conducted in perfect good faith is in no sense collusive, I can see no ground for the suggestion that there is any impediment in the way of the due determination of this appeal.

I do not refer in detail to the facts of the case which have been already stated, but I regard them as establishing that within an inclosure at Kempton Park certain "bookmakers" are in the habit of betting, that such persons make betting their trade or business, and that the fact of such betting taking place within the inclosure is known to the defendants, and the betting not being interfered with must be taken to be sanctioned by them.

The action is based on the allegation that the respondents have infringed the provisions of the Betting House Act, 1853, by opening and keeping open the inclosure for the purpose of being used by professional "bookmakers" for betting with persons resorting thereto. In order to determine the question submitted for the decision of your Lordships' House, it is necessary carefully to consider both the history and the provisions of the Betting House Act of 1853.

In relation to the origin of the Act, I concur in the statement made by Hawkins J. in the case of *Reg.* v. *Cook*. (1) It appears that shortly before the passing of the Act of 1853 a system of ready-money betting had sprung up in the metropolis and the larger provincial towns. Houses, offices, and rooms were opened for the sole purpose of carrying on this betting business. Public-houses also were utilized for effecting the

(1) 13 Q. B. D. 377.

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same object. In these places lists giving the names of horses entered for different races were exposed to view. Against the names of the horses on these lists figures were placed shewing the odds the betting man or bookmaker carrying on the betting business was willing to lay against each horse. These betting places were open to the public in the same way that a shop is kept open. Any one wishing to back a horse would have to deposit the sum of money he desired to risk with the person in attendance, receiving a card recording the transaction. Such a mode of betting of course represents what is termed ready-money betting. These list houses became so numerous, and the betting carried on in them became so extensive, that the Government of the period determined to deal rigidly with the evils resulting therefrom, and to suppress by rendering illegal those list houses. With this object, as declared by Sir Alexander Cockburn, the then Attorney-General, the Act of 1853 was passed. The object of that Act can be discovered from its contents. It is intituled, "An Act for the Suppression of Betting Houses," and the preamble recites "that a kind of gaming has of late sprung up tending to the demoralisation and injury of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies. For their suppression be it enacted," &c.

It will be seen that, so far as the preamble discloses the intention of the Legislature, the evil intended to be dealt with is not the act of betting either by depositing money or on credit, which was and is legal. The evil recited is the carrying on of a betting business under certain conditions in a house or office; and for suppression of these houses and offices the provisions of the Act were framed.

Doubtless the contents of a preamble of an Act of Parliament cannot for any purpose control the actual clear provision of the statute; but if the wording of the statute gives rise to doubts as to its proper construction, the preamble can be and ought to be referred to in order to arrive at the proper

construction to be put upon the enacting portion of the statute.

Upon this subject I fully accept the dictum of Lord Tenterden in *Halton* v. *Cove* (1), who thus summarises the matter: "It is very true, as was argued for the plaintiff, that the enacting words of an Act of Parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it. Yet on a sound construction of every Act of Parliament I take it the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act, and that the preamble affords a good clue to discover what that object was."

With the intention apparently of dealing and dealing only with the evils recited in the preamble, the Legislature proceeded in the 1st section of the Act to enact: "No house, office, room or other place shall be opened, kept or used for the purpose of the owner, occupier or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier or keeper or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; . . . . and every house, office, room or other place opened, kept or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." And by s. 2: "Every house, room, office or place opened, kept or used for the purposes aforesaid or any of them, shall be taken and deemed to be a common gaming-house."

The provisions of this second clause are very important when construing and applying the first. In order to bring the first clause into operation something must exist that can at least constructively be regarded as a common gaming-house. As the betting at Kempton Park was not carried on in a house, room, or office, it becomes necessary to determine what effect is to be given to the words "other place," and how far they can be held to apply to the inclosure wherein the alleged illegal betting took place.

(1) (1830) 1 B. & A. 538, 558.

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Speaking in general terms, whilst the place mentioned in the Act must be to some extent ejusdem generis with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word "place."

There must be a defined area so marked out that it can be found and recognised as "the place" where the business is carried on and wherein the bettor can be found. Thus, if a person betted on Salisbury Plain, there would be no "place" within the Act. The whole of Epsom Downs or any other racecourse where betting takes place would not constitute a place; but directly a definite localization of the business of betting is effected, be it under a tent or even movable umbrella, it may be well held that a "place" exists for the purposes of a conviction under the Act. If this view be correct, I think that the inclosure existing at Kempton Park might, physically speaking, under certain conditions constitute "a place" within the meaning of the 1st and 2nd sections of the Act of 1853. It is a defined space limited by metes and bounds, and of such an area that a person therein carrying on the business of betting can be found. I also think, as I have previously stated, that it is established that within this inclosure betting took place, that the bets were made by men whose business is that of a bookmaker or betting man, and that such betting took place with the cognizance, and therefore it must be held with the sanction, of the defendants. But the main question involved in this case has still to be solved, namely, Was the inclosure opened, kept, or used for the purpose of the owner, occupier, or any person using the same, or of any person conducting the business thereof, betting with persons resorting thereto? In my opinion this question must be answered in the negative. For I think that the certain conditions I have just referred to do not exist, and that in consequence of the absence of those conditions this inclosure cannot be held to be "a place" wherein an offence has been committed.

In this case the only alleged "place" where the business of

betting is said to be carried on is the particular inclosure referred to. But it must be remembered that the whole of Kempton Park racecourse is inclosed; within that inclosure there are certain stands and other inclosures. Unfortunately it is known to all that as a general rule wherever racing takes place betting upon the races exists also. Some portion of those who witness horse-races invariably bet. It may be taken, therefore, that of the spectators who enter the Kempton Park racecourse a certain number intend to bet on the races and do so. Those who back horses are for the most part members of the general public; those with whom the horses are backed, that is, those who lay the odds against the different horses, are known as "bookmakers," and no doubt attend at all race-meetings with the primary object of carrying on their business of betting.

It is probable that throughout the whole of the inclosed racecourse betting on the different races takes place in greater or less degree. Certainly there is nothing to prevent such betting everywhere within such inclosed course. But by a sort of gravitation, resulting apparently from convenience, the majority of those who bet at Kempton Park congregate within a special inclosure—the one in question—for the purpose of betting. The spot appears to attract the "bookmakers" in consequence of its being central and adjacent to different stands, and within sight of the winning post, and of the board on which the names of the horses about to start and their jockeys are made public. But I do not find that the defendants have opened, kept, or used this inclosure for the purposes of betting more than any other portion of the racecourse. Any member of the public can enter it for the purpose of seeing the race. No facilities for betting are provided by the defendants, and the fact that bets are made therein results from the personal action of the persons entering it. I certainly can find no direct evidence that the inclosure was opened, kept, or used for the purpose mentioned in s. 1 of the Act, that is, for conducting the business of betting. Doubtless it is proved that betting as alleged systematically took place within the inclosure to the knowledge of the defendants. Is that evidence sufficient to

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establish an infringement of the Act? In my opinion it is not. As was often remarked during the argument of the case at the bar, betting is not illegal in itself, and the statute never intended to make it so. It is only the opening, keeping, or using of a place for the carrying on of a betting business that is illegal. This is shewn by the consequences created by s. 2 of the Act. The place wherein illegality exists is declared to be a common gaming-house, and the right to arrest and search all persons found therein follows. A man who bets or allows betting in his private house, or the man who, associating with his fellows in a club, even a sporting club, there bets upon races, is guilty of no illegal act. In such cases the ingredient of dedication or appropriation of the place to the purposes of a betting business is absent. And as I think that in this case such ingredient is equally absent, it appears to me that this inclosure has not, by the proceedings which occur within it, been constituted a place within the meaning of s. 1 of the Act of 1853.

In thus dealing with the case, I have treated the whole inclosure as being the alleged "place." There is another view that may be presented, namely, that each peripatetic bookmaker using the inclosure occupies "a place," that is, the ground upon which his two feet rest, and that having permission so to stand upon any particular spot he may from time to time select, there is a shifting appropriation of each of such spots for the purpose of carrying on his business. But in such case, what can be said to constitute the "place" requisite to constitute the offence? There is nothing in any way resembling a house, office, or room. No defined area exists; nothing to indicate where the bookmaker can be found is to be seen; and, as was admitted by Mr. Asquith during his argument at the bar, every piece of earth on which a betting man's feet rest, say on Salisbury Plain, cannot constitute a place ejusdem generis with house, office, or room. I think the statement of the same learned counsel that "a place must be a place where a man according to the ordinary usages would be found" is correct.

I do not purpose referring to the cases which were quoted at

the bar in detail, but I would say that I think it must be taken that the judgment of the Court of Appeal in the present case overruled the decisions in *Eastwood* v. *Miller* (1), *Haigh* v. *Town Council of Sheffield* (2), and *Hawke* v. *Dunn*. (3) Whilst with several cases, such as *Shaw* v. *Morley* (4), *Bows* v. *Fenwick* (5), in which convictions took place, no conflict arises. On the other hand, the judgment appealed from seems to be supported by the Scottish case of *Henretty* v. *Hart* (6) and *Snow* v. *Hill*. (7)

For these reasons I am of opinion that the judgment of the Court of Appeal should be affirmed, and the appeal therefore dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, March 14, 1899.

Solicitors for appellant: *Le Brasseur & Oakley.*

Solicitors for respondents: *Peachey & Son, for Arthur Cheese.*

(1) L. R. 9 Q. B. 440.
(2) L. R. 10 Q. B. 102.
(3) [1897] 1 Q. B. 579.
(4) L. R. 3 Ex. 137.
(5) L. R. 9 C. P. 339.
(6) 13 R. 9.
(7) 14 Q. B. D. 588.

Applied. In re DUKE OF NORFOLK [1950] 1 Ch. 467

Considered. Re DUKE OF NORFOLK'S WILL TRUSTS. [1949] 2 All E.R. 701.

Considered. Re DUKE OF NORFOLK [1950] 1 Ch. 25

Considered and Dictum of LORD MACNAGHTEN, at p. 212, applied. Re DUKE OF NORFOLK'S WILL TRUSTS. [1950] 1 All E.R. 664.

[HOUSE OF LORDS.]

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EARL COWLEY . . . . . APPELLANT;

AND

THE COMMISSIONERS OF INLAND REVENUE . . . . . RESPONDENTS.

Considered. In re LAMBTON'S MARRIAGE SETTLEMENT [1952] 1 Ch. 752

Revenue—Estate Duty—Tenant for Life and Tenant in Tail—Mortgage of Settled Property—Equity of Redemption—Annuity—Value of Property passing on Death of Tenant for Life—Finance Act 1894 (57 & 58 *Vict. c.* 30) *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 5.

Father and son, tenant for life and tenant in tail respectively, executed a disentailing deed by which they granted the estates to a trustee to hold freed from the estate tail to such uses as they should jointly appoint. In exercise of that power father and son mortgaged the estates in fee simple to a company as security for a loan, part of which was advanced for the benefit of the father and part for the benefit of the son. With part of the loan prior incumbrances on the father's life estate were paid off, and the company took an assignment of the debts and all the assignors' rights and powers of recovery as further security for the loan. Father and son then executed a deed of resettlement by which the estates were charged with an annuity to the son payable during the father's life, and subject thereto were declared to be held in trust for the father for life and after his death for the son for life with remainders over. Upon the father's death in 1895 the Crown claimed from the son under the Finance Act 1894 estate duty upon the gross value of the estates without allowing any deduction in respect either of the mortgage to the company or of the annuity which ceased with the father's life:—

Held, reversing on this point the decision of the Court of Appeal (*In re Earl Cowley's Estate*, [1898] 1 Q. B. 355), that the case fell under s. 1 of the Finance Act 1894, that the settled property which passed to the son on the father's death was only the equity of redemption, and that estate duty was therefore payable only on the equity of redemption.

Held also, affirming the decision of the Court of Appeal on this point, that no deduction was allowable in respect of the annuity.

The decision of Pollock B. and Bruce J., [1897] 2 Q. B. 47, restored.

THE following statement of facts is taken in substance from the judgment of Lord Watson.

The last Earl of Mornington, who died in 1863, by will devised estates, called for brevity the Mornington estates, to trustees in fee upon trust (after payment of certain charges and

annuities) for the first Earl Cowley for life, after his death upon trust for his eldest son Viscount Dangan (afterwards the second Earl Cowley) for life, and after his death upon trust for his first and other sons in tail male, with remainders over, and in default upon trust for the testator's own right heirs for ever. The second Earl Cowley (during the first Earl's life and also after his death in 1868) created annuities and charges upon his life estate in the property as security to the London Assurance Corporation for advances made by them. On January 14, 1887, the appellant the only son of the second Earl Cowley having come of age, he and his father executed a disentailing deed by which they granted the Mornington estates to a trustee to hold freed and discharged from the estate in tail male and all other estates in tail of the appellant and all estates, rights, interests, and powers to take effect after the determination or defeazance of such estates in tail male, or in tail, to such uses, upon such trusts, and with and subject to such powers and provisions, and in such manner as the second Earl and the appellant should at any time or times thereafter by any deed or deeds jointly direct and appoint, and in default of and until such appointment to the use of the second Earl Cowley during his life, without impeachment of waste, by way of restoration of the estate vested in him immediately before the execution of the deed of disentail.

The appellant and his father thereafter borrowed the sum of 210,000*l.* from the Prudential Assurance Company, Limited; and, in security for its repayment, they, on June 8, 1888, in virtue of the powers reserved to them jointly, granted a mortgage in fee to the company for that amount over the estates subject to a proviso for redemption. Of the sum thus advanced by the Prudential Company 150,853*l.* 6*s.* 7*d.* was paid by that company, at the request of the mortgagors, to the London Assurance Corporation, being the total amount of the liabilities which at that date the second Earl Cowley had incurred to the latter corporation upon the security of the life estate which he had before the disentail. On the same day, June 8, 1888, the London Assurance, upon receiving full payment of the debts then owing to them by the second Earl,

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executed, as had been agreed on, an assignment to the Prudential Company of the annuities and mortgage debts created by the second Earl, together with the full right and benefit of the assignors' powers and securities for compelling payment of these several debts, with interest due or to become due thereon.

The second Earl and the appellant, in the further exercise of their reserved powers, executed, on June 9, 1888, with consent of the trustees in whom the estates were legally vested, a deed of resettlement of the equity of redemption. The trusts upon which the estates were to be held were declared to be, inter alia, (1.) subject to such powers and provisions as the appellant and his father should, by any deed or deeds, revocable or irrevocable, jointly appoint; (2.) that the appellant, his executors, administrators, and assigns, should receive, during the life of the second Earl in the events which happened, a sum of 3000*l.* a year; and (3.) subject and charged as aforesaid, the continuance of the second Earl's life estate, in restoration and by way of confirmation of the life estate limited to him by the will of the Earl of Mornington; and, after the second Earl's death, (4.) upon trust for the appellant and his assigns during his life, without impeachment of waste; and (5.) from and after the appellant's death, upon trust for the first and every other son of the appellant successively in tail male, with remainders over. By the same deed it was mutually agreed that as between the second Earl and the appellant the second Earl, his heirs, executors, and administrators, should be primarily liable for the interest accruing due during the second Earl's life upon the sum of 210,000*l.*, borrowed on mortgage from the Prudential Assurance Company; that, in the event of the Earl's predecease, the appellant should be primarily liable for the interest accruing due during the residue of his life; and that, after the death of the longest liver of them, the mortgaged premises should be the primary fund for payment of the said sum of 210,000*l.*, and the interest thenceforth to accrue due thereon.

The appellant and his father obtained farther advances amounting to 20,000*l.* from the Prudential Company, for which they executed a second mortgage on the Mornington estates.

Of the total sum of 230,000*l.* received by them from the company, 199,987*l.* 11*s.* 8*d.* was paid to or on behalf of the second Earl and 30,012*l.* 8*s.* 4*d.* to or for the appellant. The appellant, until the death of the second Earl, which occurred on February 28, 1895, was in receipt of the annuity payable as provided in the deed of resettlement.

After the death of his father, the appellant lodged a statement and valuation of the amount upon which he was liable to pay duty under the Finance Act 1894. The Commissioners of Inland Revenue, the respondents in this appeal, accepted the gross estimate of 538,426*l.* 11*s.* 1*d.*, but disallowed two items which were claimed as deductions from it by the appellant. These were (1.) the sum of 199,987*l.* 11*s.* 8*d.*, part of the sum of 230,000*l.*, with which the settled estates had been charged, as aforesaid, in favour of the Prudential Company, and (2.) a sum of 65,200*l.*, being the capitalised value of the annuity payable to the appellant during the life of his father, and amounting, at the death of the latter, to 3000*l.* per annum.

The appellant then presented a petition in accordance with the provisions of s. 10 of the Finance Act, in which he craved a declaration that the whole sum of 230,000*l.* and the sum of 65,000*l.* ought to be allowed as deductions. The Divisional Court (Pollock B. and Bruce J.) made a declaration that the whole of the mortgage debt of 230,000*l.* ought to be allowed as a deduction, and that the sum of 65,200*l.* ought not to be allowed. (1) The Court of Appeal (A. L. Smith, Rigby and Collins L.JJ.) reversed the decision of the Divisional Court upon the first item and affirmed it upon the second. (2)

1898. June 20, 27; July 4, 11. *Haldane Q.C.* and *H. Fellows* for the appellant. The Finance Act 1894 by s. 1 imposes estate duty "upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of" a person dying after the commencement of that part of the Act. By s. 2 sub-s. 1 "Property passing on the death of the deceased shall be deemed to include . . . . (*b*) Property in which the deceased or any other

(1) [1897] 2 Q. B. 47. (2) [1898] 1 Q. B. 355.

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person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." What was the property which passed here under s. 1, or is to be deemed to pass under s. 2 sub-s. 1 (*b*)? Simply the equity of redemption on payment of the whole mortgage debt of 230,000*l*. To what extent did a benefit accrue or arise to the appellant by the cesser of his father's life estate? To the extent of the value of the equity of redemption. The question turns entirely on the real effect of the deeds. The disentailing deed gave the appellant and his father power to sell or to mortgage in fee. They joined in mortgaging the estates in fee to the Prudential Company for sums amounting to 230,000*l*. If instead of mortgaging they had raised the money by sale of part of the property, estate duty could only have been levied upon the unsold part of the estates. There can be no difference in principle between a sale and a mortgage. The resettlement of the estates was subsequent to the mortgage: all that there was to resettle was the equity of redemption. The Court of Appeal ignore the fact that the mortgage was in fee by the father and son jointly, and treat it as two mortgages, one by the father of his life estate and the other by the son of his reversion. The fact that the prior mortgages on the father's life estate were kept alive and assigned to the Prudential Company does not affect the question. That was only a conveyancing device introduced for the purpose and with the effect of better securing the mortgage against mesne incumbrances, and cannot be made to found a right to estate duty which would not otherwise have arisen. The question of merger or non-merger of the life estate is irrelevant. The arrangements made when the appellant attained his majority put an end to the settlement created by Lord Mornington's will, and enabled the second Earl and the appellant to deal with the settled estates as a whole by a mortgage of the fee as an overriding charge on the estates. Then on the second Earl's death all that remained was the equity of redemption subject to the mortgage for 230,000*l*.; and except as regards such equity no benefit arose or accrued to the appellant on the second Earl's death and no benefit whatever arose to the mort-

gagees. If the decision of the Court of Appeal is correct estate duty might become leviable twice over in respect of the same property. Suppose the 230,000*l.* had been raised in order to buy additional property to be put into settlement. Estate duty would in that case be payable on the property so acquired and settled and also upon the original property treated as unincumbered. So, if the second Earl had paid off the Prudential mortgage and taken a transfer to himself. Further, the decision below makes the duty unequal as between settled and unsettled property. If, for example, unsettled property had been mortgaged and then the equity of redemption had been settled, this claim could not have arisen. In any case the 200,000*l.* which was received by the second Earl for his own purposes should be allowed as a deduction from the principal value of the estate.

As regards the annuity of 3000*l.* no benefit accrued to the appellant or any one else by the cesser of the second Earl's interest.

Sir R. B. Finlay S.-G. and *Vaughan Hawkins* (*Sir R. E. Webster* A.-G. with them) for the respondents. The property which passed on the death of the appellant's father within the meaning of the Act was the whole property to which the second Earl became entitled for life under Lord Mornington's will. A tenant for life and a tenant in fee in remainder cannot, for the purposes of the Finance Act, vest in themselves, or in either of them, or in a mortgagee an indivisible estate in fee simple. Here the mortgage amounted to nothing more than a mortgage by the second Earl of his life estate, and by the appellant of his reversion, just as if there had been separate mortgages by distinct instruments of the life estate and the reversion respectively. Upon the death of the second Earl and the cesser of his life estate, the incumbrance created by him on his life estate also ceased, and the property which is to be deemed to have passed was the original unincumbered property in which the second Earl took a life interest under Lord Mornington's will. That is the principle upon which *Attorney-General* v. *Charlton* (1) was decided, the decision being affirmed in this

(1) (1877) 2 Ex. D. 398, 411, 413.

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House (1), namely, that for fiscal purposes the succession must be taken to have been acquired under the original devise and not under the power of appointment. Whatever might be the effect in other cases of a joint mortgage by tenant for life and tenant in fee in remainder, here there could be no merger: the pre-existing life interest of the second Earl had been expressly kept alive by the Prudential Company taking an assignment of the mortgages on that life interest. It remained a subsisting life interest until the second Earl's death. Sect. 7 sub-s. 1 makes allowances for debts or incumbrances created wholly for the deceased's own use or benefit and to take effect out of his own interest. That applies to cases where the property incumbered passes subject to the charge. Here the property which passed, the life interest of the second Earl, did not pass subject to the charge, the charge on the life interest having ceased when the life interest ceased. The only incumbrance that remained when the property passed to the appellant was the incumbrance created by him on his remainder, and no deduction is allowable in respect of it either under s. 7 or any other part of the Act. In no case, whatever view may be taken, could any deduction be allowed in respect of more than that part of the mortgage money which was raised for the benefit of the second Earl.

Haldane Q.C. in reply.

The House took time for consideration. Between the arguments and the judgment in this case the appeal in *Attorney-General* v. *Beech* (2) was heard and decided.

1899. March 14. EARL OF HALSBURY L.C. My Lords, the question in this case is upon what property the duty is payable by the appellant under the Finance Act 1894. That statute enacts in the 1st section that certain duties shall be levied and paid upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of the Act.

The second Earl Cowley died possessed of the equity of

(1) (1879) 4 App. Cas. 427, 438. (2) [1899] A. C. 53.

redemption of certain estates, and the appellant, to whom that property had passed, is undoubtedly liable to pay the duties ascertained in the specified manner.

It does not appear to me that that question is a very difficult one. What I have described as the equity of redemption is undoubtedly the true description of the property, and what passed upon the death of the second Earl to the third Earl was the equity of redemption. How the value of that is to be ascertained is for this purpose unimportant. The thing which is liable to duty is that property and no other thing.

For the purpose of my opinion I discard all reference to the 7th section, which is only applicable to the mode of determining the value of an estate whatever that estate is; and if I am right that the estate which the second Earl possessed was that which came to the third Earl by the second Earl's death, we have nothing to do with allowances or the series of enactments upon that subject, but the whole question must be determined upon the property real or personal, settled or not settled, which passed on the death of the second Earl.

My Lords, I have great difficulty in following the reasoning by which, in the Court of Appeal, it has been held that one is at liberty to go back to the history of the property to which the third Earl succeeded, and to split up that property into the different interests of which it was originally composed. If I may trace out in this case the life estate and the remainder in fee or in tail, I do not know how far back in the history of the property in question I may be entitled to go, nor am I quite certain what is intended to be effected by such an inquiry. There is no part of the Finance Act which appears to me to give ground for such an investigation, and I do not know that the adoption of any such principle by your Lordships would not have a far wider operation than upon such taxation questions as arise in such cases.

It would seem to me to be a very pertinent question to ask whether the deeds which were executed by the late Earl and the appellant did or did not operate as they purported to operate; and if not, why not? But if they did, what prevented the appellant and his father granting a mortgage to the

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Prudential Company upon the settled estates? What was done with the money seems to me to be immaterial. Though as a matter of fact the greater part of it was paid to liquidate the liabilities of the second Earl, there was a second mortgage for the security of a further advance of 20,000*l.*; but in the view that I take of this case it is immaterial to pursue the destination of the money or the source from which it came. As a matter of fact, the whole property which is in question upon this part of the case is the equity of redemption. If that is all that the appellant has received that is all upon which he is bound to pay duty.

Your Lordships have already held in *Attorney-General* v. *Beech* (1) that where a tenant for life and remainderman in fee combine so as to get complete command of the estate in fee they may dispose of it as they will, and I am unable to comprehend why, when they grant a mortgage in fee, that transaction is capable of being dissected so as to prevent the union of the two estates, and by an artificial process resolve the estate into its original elements, or into its original settlement, and treat them as though such new arrangement had not been made at all. It would seem as though the argument suggested (although the Act does not say so) that the ordinary transaction of a resettlement of an estate can, for the purpose of the Finance Act, be traced back to any period, however remote, and duties exacted upon the artificial theory that you must treat each death in the chain of investigation as giving rise to liability to duty under an Act passed long after the resettlement or the death.

There is only one argument—namely, the conveyancing point referred to by Collins L.J.—which seems to give any ground for looking back to the history of the transactions out of which this question has arisen. It appears that the incumbrances on the second Earl's life estate were assigned to the company advancing the money as a protection to them in case any claim should be made in respect of some dealing with his life estate by the second Earl. If it had been found that any such dealing had taken place the lenders wanted to have a

(1) [1899] A. C. 53.

right which should take precedence of any such dealing; but I confess I am unable to understand how this transaction could affect or in any way interfere with the power of the second and third Earl to resettle the estate, or, having resettled it, to grant a mortgage in fee such as they did grant with the result which I have described. I am wholly unable to give any such interpretation to an Act which seems to me in its ordinary and natural meaning to be clear enough, and I for one decline to go into a minute investigation as to how the equity of redemption was created. It is enough for me that that is the property which, under s. 1 of the Act, has passed to the appellant, and that alone is the property upon which he is liable.

I see no ground for dealing with s. 2, since, for the reasons I have given, I think it is s. 1 to which you must look to see what property real or personal, settled or not settled, passed upon the death of the second to the third Earl; but if I were compelled to give a construction to s. 2 sub-s. 1 (*b*), I should come to the same conclusion in respect of the liability to duty, since I think the benefit accruing or arising to the third Earl was only to the extent of the value of the equity of redemption. But, as I have said, the question must be determined on s. 1 alone.

As to the claim by the appellant to a deduction in respect of the cesser of the rent-charge of 3000*l.* a year, it is enough to say that the argument in respect of it is hardly intelligible, and certainly the appellant has made out no case to establish it.

No question as to the policies has been raised, and I therefore do not allude to them.

My Lords, for these reasons I am of opinion that the appeal should be allowed and with costs.

LORD WATSON (after stating the facts and the claims made by the appellant for deduction in respect first of the mortgage and secondly of the annuity). My Lords, the legal questions raised by these two claims are so different in their character that I shall notice them separately. I have come, without much difficulty, to the conclusion that the order of the Court

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of Appeal ought to be reversed, and the judgment of the Divisional Court restored.

With regard to the second deduction claimed by the appellant, I have had no difficulty in coming to the conclusion that the decisions of both Courts below were right. Very little was said about the point in the argument of the learned counsel for the appellant, and, so far as I can see, their reticence was not injudicious. The annuity, the capitalised value of which forms the subject of the claim, was regularly paid to the appellant during his father's lifetime, and ceased to be payable on his death. No part of it formed a charge upon the equitable estate to which the appellant has succeeded, under the deed of resettlement, not in fee but in life-rent. In these circumstances I do not think it can, with any degree of plausibility, be maintained that the estate which passed to the appellant upon his father's death has been thereby diminished or affected.

The argument addressed to us with reference to the other point, the charge of 230,000*l.* advanced on mortgage by the Prudential Assurance Company, Limited, did not, so far as I could discern, involve any serious question as to the construction of the Finance Act. It turned mainly, if not exclusively, upon the real character and legal effect of the deeds by which the advance was secured. On the one hand, it was not disputed by the appellant's counsel that if the original settlement of the Mornington estates had remained unaltered, and these deeds had been executed by the late Earl as life-renter, and by the appellant as expectant fiar, no part of the sum of 230,000*l.* would have formed a proper deduction from the amount upon which the appellant is liable for finance duty. In that case the appellant would have derived benefit from his father's decease to the extent to which he had borrowed upon the security of his right in expectancy, and would thereby have been enabled to pay his own debt. On the other hand, counsel for the Crown hardly ventured to dispute that if the 230,000*l.* had been duly charged by the original settlor, or had been subsequently validly charged upon the fee of the settled estates, the appellant must be held to have taken the estates cum onere,

and could not be held, upon his father's death, to have taken any benefit from the charge of 230,000*l.*, or in the estates, so far as these were affected by it.

The learned counsel for the respondents accordingly addressed themselves to the bold and, in my opinion, somewhat extravagant contention that, notwithstanding the tenor of the securities held by the Prudential Assurance Company, the reality of the transaction between the company and the mortgagors, apart from any question as to the form of conveyancing adopted in the deeds, consisted in the second Earl Cowley and the appellant merely pledging their respective rights of life-rent and expectant fee. I should not have thought that the argument was deserving of much consideration, had it not been that it appears to have found favour with the learned judges of the Court of Appeal.

A. L. Smith L.J., who was of the same opinion with the other learned Lords Justices, after stating that the second Earl's life estate was not extinguished or merged into an equitable estate in fee in the Prudential Company, goes on to say: "The real substance of what was done, and this is what is to be looked at apart from the form of the conveyancing, was that the second Earl mortgaged his life estate in the settled estates to the Prudential Company, and that his son mortgaged his reversion in such estates to that company to secure the repayment of the 230,000*l.*, and that this was the real transaction, whether it was bound to be carried out by one deed or by two."

The argument thus stated appears to me to ignore these facts that, in the first place, the Finance Act 1894 does not prohibit the alteration or modification of the terms of the settlement by any legitimate means; and in the second place, that, assuming the proceedings taken in the years 1887 and 1888 for disentailing, charging with debt, and resettling the estates, to have been at the time valid, the Act of 1894 does not contain a single provision which, either directly or indirectly, denies effect to them. It is not maintained on behalf of the Crown that any one of these proceedings was illegitimate or invalid. The disentailing assurance had the legal effect of vesting the second Earl and his son with the full

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right and title to dispose of the life-rent and the fee of the settled estates, and in virtue of that right and title they entered into onerous contracts with the Prudential Company, by which they professed to convey, and did convey to the company, in security, the immediate fee of the estate. Notwithstanding the reasoning of the learned Lords Justices, I fail to comprehend how the merger or non-merger of the second Earl's life estate could possibly affect the title of the Earl and his son to convey the immediate fee. I see no reason to doubt that, under their two conveyances, the company acquired, and from the date of the completion of their securities were possessed of an interest in fee, which was effectual against the beneficiaries under the settlement made by the last Earl of Mornington including the appellant. I think the appellant took the estate cum onere of the charge of 230,000*l.*, which under the settlement as modified affected the settled estates in the same way as if it had been created by the original settlor, and that upon his father's death no interest or benefit accrued to the appellant in respect of any part of the equitable estates, except so far as they exceeded in value the securities held by the Prudential Assurance Company. Any other conclusion is, to my mind, at variance with the substance and reality of the transaction.

A certain degree of colour was lent to the respondents' argument by the circumstance that the Assurance Company took an assignment of the debts due by the second Earl to the London Assurance, which were charged upon his life estate with the same powers of recovery which were competent to their assignors. The object of the company in taking the assignment was, not to impair the security which they had obtained from the appellant and his father over the immediate fee of the settled estates, but to enable them to compete with creditors, if any, to whom the second Earl might possibly have previously conveyed his life estate. In short, the assignment was a precautionary device resorted to in order to meet the possibilities of events which have never occurred.

LORD MACNAGHTEN. My Lords, the principle on which the Finance Act 1894 was founded is that whenever property

changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding. Sect. 1 gives effect to that principle. Subject to certain exceptions or savings, it imposes a duty called estate duty upon the principal value of all property "settled or not settled" which passes on death. Sect. 2 is merely subsidiary and supplemental. It was intended apparently to sweep in a few cases which were thought perhaps to be within the spirit though not within the letter of the proposed enactment, or else were supposed likely to lead to evasion if not made equally subject to estate duty. Sect. 2 therefore declares that the expression "property passing on the death of the deceased" shall be "*deemed* to include" property classified under four different heads, to no one of which rightly understood is that expression literally applicable. The rest of the Act deals with matters of detail valuation and machinery.

The 1st section contains the pith and substance of the enactment. It is comprehensive, broad and clear. The other provisions of the Act, which were dragged into the discussion rather unnecessarily as it seems to me, are strangely confused and singularly ill-drawn. But still I do not think that the Act is wholly to blame for the perplexity in which the learned judges below found themselves entangled. I think they took a wrong turn at starting. They left the broad highway for a narrow by-path, which led in a wrong direction and presented difficulties increasing at every step. Is it any wonder if they came to a wrong conclusion?

The first question as it seems to me—the question that lies at the very threshold of our inquiry—is simply this: Under which section of the Finance Act 1894 does the present case fall? Is it the ordinary and normal case of property passing on death, or is it one of those exceptional cases in which property is deemed to pass, though there is no passing of property in fact? Does it come under s. 1 or under s. 2? The learned judges of the Court of Appeal, one and all, have held that the case is not within s. 1. The reason is given by A. L. Smith L.J.

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His Lordship quotes the words of s. 1, and then goes on to say: "This section would not, I think, embrace the present case, for the life estate of the second Earl ceased at his death and passed to no one." I must say I cannot think that reasoning satisfactory. What the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which if it be a limited interest can never pass. With an interest that ceases on death the Act is not directly concerned, except in the one case where without any passing of property a benefit accrues or arises by reason of the cesser of a determinable interest such as a charge that expires. In every case in which property comprised in a settlement passes on death the life estate or other limited interest of the preceding owner must have ceased for good and all. If the criterion proposed by the learned Lord Justice were the true criterion, settled property could not in any case come within s. 1. But then that section expressly and in terms applies to settled property. You might just as well strike the word "settled" out of s. 1 altogether as hold that the section does not embrace a case where a limited interest under a settlement ceases on death and passes to no one.

I am, therefore, compelled to differ from the Court of Appeal at the very outset. I think the present case falls within s. 1. I think it belongs to a class of cases which the authors of the Act had directly in view when they framed that section.

Now, if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive. Sect. 1 might properly, I think, be headed, "With regard to property passing on death, be it enacted as follows." Sect. 2 might with equal propriety be headed, "And with regard to property not passing on death, be it enacted as follows." I cannot, therefore, agree with Rigby L.J. when he says that s. 2 is a provision "explanatory" of s. 1. In my opinion the two sections are quite distinct, and s. 2 throws no light on s. 1. But, then, no doubt s. 2 speaks of "property in which the deceased . . . . had an interest ceasing on the death of the deceased." And that, it may be said, was just the position of the second Earl with regard to the Mornington settled estates. So it was. But s. 2

does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section. For property in the lifetime of the deceased subject to a charge or interest which ceased on the death must of course pass free from that charge or interest. And, so passing, it must of course be valued accordingly. That is s. 1. You do not want s. 2 for that. You cannot resort to s. 2. For that would be giving the duty twice over. The Crown cannot have it both ways. Double duty is forbidden by the Act.

It is interesting and, I think, instructive to refer to ss. 4 and 5 of the Succession Duty Act, from which the provisions of s. 2 sub-s. 1 (*a*) and s. 2 sub-s. 1 (*b*) are evidently adapted. The marginal note to s. 4 is this: "General powers of appointment to confer successions." In the Succession Duty Act a power of appointment confers a succession when it is exercised, but only then. In the analogous provision of the Finance Act "property of which the deceased was competent to dispose at the time of his death" is deemed to pass though the power be not exercised. Then the marginal note to s. 5 of the Succession Duty Act runs as follows: "Extinction of determinable charges to confer successions." The section itself provides that "Where any property shall . . . . be subject to any charge, estate, or interest determinable by the death of any person . . . . the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession." It is quite plain I think, that the provisions of s. 2 sub-s. 1 (*b*) of the Finance Act 1894, have been borrowed and adapted from that section. But they do not, as I said just now, refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass. On reading the Act I think this is made tolerably clear not only by the opening sentence of s. 2 sub-s. 1, but also by the directions for valuing "the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased" in s. 7 sub-s. 7. If property passes you can put a value on it by considering what it would fetch in the open market. You must resort to other means in order to estimate the value of property deemed

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to pass when an interest ceases. And here I would venture to say that, in my opinion, the provisions of s. 7 sub-s. 7 (*b*) are not open to the severe censure passed upon them in the Court of Appeal. They are quite intelligible if s. 2 sub-s. 1 (*b*) be confined to the case which it was really intended to meet. The difficulty, so far as there is any, comes from the drafting of s. 2 sub-s. 1 (*b*). There would have been none, I think, if the draftsman had been content to follow the wording of the Succession Duty Act. But the general word "interest" without the word "charge" preceding it at first sight seems to point rather to a life interest than to a determinable charge. And thus it was, I think, that the Court of Appeal were led into the error which seems to run through their judgment.

Now, if the present case is within s. 1 and not within s. 2, the only remaining question is, what was the settled property that passed on the death of the second Earl? "Settled property," according to the definition of that expression in the Finance Act 1894, "means property comprised in a settlement." It is difficult to see what else it could possibly mean. But at any rate it is a comfort to find something in the Act about which there can be no dispute. The settled property in this case is the property comprised in the resettlement of June 9, 1888. What was that property? Why the equity of redemption of the Mornington estates, which were subject to certain incumbrances described as the overriding charges, and subject also to the mortgage in fee simple in favour of the Prudential Assurance Company to secure 230,000*l*. There can be no doubt about that. What, then, was the principal value of the settled property? That, according to s. 7 sub-s. 5, must be estimated at the price which in the opinion of the commissioners the property comprised in the resettlement would have fetched if sold in the open market at the time of the second Earl's death. What right the commissioners can have to swell that estimate by adding to it a sum equal to the amount of the Prudential mortgage I cannot understand. The mortgage did not pass on the death of the second Earl. The mortgage debt was no part of the settled property. On the contrary, it diminished the property before resettlement. I may remark in

passing that we are not concerned with s. 7 sub-s. 1. Whatever the meaning of that section may be, as to which I do not hazard a conjecture, it can have nothing to do with the present case, for in the present case the property which had to be brought into the aggregated estate "for determining the rate of duty" was not subject to any debt. It was only the equity of redemption that was resettled. Then we had a long argument about the doctrine of merger, and an argument, longer still, intended to persuade the House that for the purpose of this Act the transaction with the Prudential ought to be split up into two distinct mortgages, one by the second Earl and one by the present Earl, one by the father mortgaging his life estate and one by the son mortgaging his reversion. The Court of Appeal say that was the real transaction. In my opinion it was nothing of the kind. The Prudential Company bargained for a mortgage in fee simple, and a mortgage in fee simple they got. Why the commissioners should seek to reform a deed which carried out the transaction between the parties in the way everybody wished to have it carried out is beyond my comprehension. The argument seems to be founded on a fallacious analogy. Because in the case of succession duty it is necessary and proper to trace a disposition of property to its origin for the purpose of seeing out of whose interest the succession is derived and so discovering the predecessor, therefore it seems to be thought you are at liberty, in the case of the Finance Act, to dissect and pull to pieces one entire and completed transaction in order to enable the Crown to exact duty in respect of property which neither passed nor can be deemed to pass. Nor, again, can I see how the question is affected by the circumstance that mortgages, in fact paid off, were transferred and kept alive for the purpose of forming a protection against mesne incumbrances during the life of the tenant for life. That is every-day practice. Every beginner is acquainted with that device. Collins L.J. thinks it decisive in favour of the commissioners. With deference, I think it has nothing to do with the question. If the interests arising under the resettlement come behind the incumbrance effected by the exercise of the joint power of appointment, can it make any

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difference that the incumbrance was protected by mortgages in a state of suspended animation and a restored life estate or any other outwork created by the skill of the conveyancer? If, indeed, it could be shewn that by the cesser of the protective interest any benefit arose or accrued to anybody under s. 2 sub-s. 1 (*b*) which has not already been taken into account, and which could be valued under s. 7 sub-s. 7, there might be some show of reason in the argument. But that would be a hopeless contention under the circumstances.

The result is that in my opinion the commissioners are wrong from beginning to end on the main point. Some people think the Act a harsh Act as it stands. It would be intolerable if it could be construed as the commissioners desire to construe it.

As regards the minor point urged by Mr. Haldane, I think the claim to deduct the value of the 3000*l.* annuity must fail. There is no foundation for it; the property passed free from the annuity, and the Act makes no provision for any such allowance. There was a provision to that effect in the Succession Duty Act. At any rate, s. 38 of that Act was so construed in this House: *Lord Braybrooke* v. *Attorney-General* (1); *Commissioners of Inland Revenue* v. *Harrison.* (2) But there is no analogous provision in the Finance Act, 1894.

I agree that the appeal must be allowed with costs here and below.

LORD MORRIS. My Lords, I agree a priori it would be expected that an estate duty accruing on a death would be calculated on the amount of property left by the deceased at the time of his death, and would be payable by the person getting the property so left to the extent to which he did get it. Has the Finance Act of 1894 enacted anything more than that? The appellant on the death of his father succeeded to an equity of redemption in the Cowley estate—a mortgage of 230,000*l.* affecting it. Much of the argument in the case has been addressed to the state of the title under the Mornington will, which, in my opinion, is beside the question,

(1) (1861) 9 H. L. C. 150. (2) (1874) L. R. 7 H. L. 1.

as are all considerations of how the title stood antecedent to the indenture of resettlement of June 9, 1888—that was the settlement under the provisions of which the property passes. It also appears to me to be irrelevant to inquire into the conveyancing mazes or devices by which that was effected. The substance is that the estate was mortgaged and that an equity of redemption remained. If the property passed to the appellant on the death of his father under s. 1—as I consider it did—I ask, what passed? Surely a property subject to a mortgage—or, if the property is to be deemed to pass under s. 2 sub-s. 1 (*b*) enacts that it is to be deemed to pass to the extent to which a benefit accrues. I ask what extent of benefit in the res of the Cowley property comes to any person by reason of the death of Lord Cowley? Surely the difference between the value of the Cowley estate and the amount of the mortgage or prior charge. With respect to the allowance claimed by the appellant by reason of the ceasing of the rent-charge payable to him during the lifetime of his father, I fail to see any sound argument for such contention. He succeeded to the Cowley property burdened with its charges; and that he at the same time ceased to enjoy a rent-charge is an indifferent fact.

LORD SHAND. My Lords, the questions raised in this appeal have been so fully discussed by some of your Lordships that I have not much to add. As to the point on which my noble and learned friend Lord Macnaghten has strongly insisted, I agree in holding that this case falls within the 1st section of the Finance Act.

The property in question having been disentailed formed the subject of a deed of resettlement under which it again became "settled estate," as defined in the Act. What then was the settled estate, beneficial in its nature, which passed to the appellant on the death of his father, the late Earl Cowley? The answer to that question is, I think, the right to the possession and enjoyment of the settled estate no longer burdened by the right of life-rent of his father, the late Earl. This right may be well described in technical legal language as the equity of redemption, which is so described, I presume, because of the

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power which the appellant has to acquire and enjoy an unburdened right of property by payment of the amount secured by mortgages on the estate and to which that estate was subject. But in ordinary language one would justly say the estate itself passed on the death of the deceased Earl to the appellant, his son, and so estate duty became due.

What then is the value of that estate? It was well and validly charged with a debt of 230,000*l.*, which formed a burden on the succession which opened to the appellant, and I confess I can see no answer to the appellant's demand to have the amount of that charge or burden taken into view as a deduction from the value of the estate in estimating the estate duty payable.

I have only to add that I agree with my noble and learned friends in thinking that the circumstance that the Prudential Assurance Company, in transacting with the late Earl and the appellant in the advances they made, took an assignment of the debts due by the second Earl to the London Assurance Corporation, and the securities given for these debts, can have no effect on the determination of the present question. That assignment was given and taken obviously for a purpose quite in common use, that purpose being only to enable the Prudential Company to compete with creditors if there were any in whose favour the second Earl might have granted securities affecting his life-rent right.

LORD DAVEY. My Lords, I entirely concur in the judgment proposed, and I should not add anything were it not that we are differing from a unanimous and carefully considered judgment of the Court of Appeal.

The first and principal question is whether the mortgage for 230,000*l.* ought to be deducted in assessing the value of the settled estates for the purpose of the payment of estate duty under the Finance Act 1894. I agree with the views so fully and clearly expressed by my noble and learned friend opposite (Lord Macnaghten) as to the construction of that Act, and I think that this case, the facts of which I need not recapitulate, clearly falls within the 1st section. But, in my

opinion, whether it falls within the 1st or the 2nd section we arrive at the same result.

By the 1st section of that Act the tax is imposed on all property, settled or unsettled, which passes on the death of any person, and by the 2nd section, sub-s. 1, property passing on the death of the deceased is to be deemed to include the property following. The only material words for the present purpose are in sub-s. 1 (*b*): "Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

I ask myself, therefore, what property passed on the death of the second Earl, or (which appears to me in this case to be the same question in other words) in what property had the second Earl an interest ceasing on his death, and did a benefit then accrue or arise?

The Court of Appeal have held that the property passing was the whole value of the estates without deduction of the Prudential Company's mortgage. And they have come to that conclusion on the grounds that the mortgage was not really a mortgage in fee, but was in truth two mortgages—one on the life estate of the second Earl, and one on the remainder of the appellant.

Since the decision in *Attorney-General* v. *Beech* (1) it cannot be denied that if tenant for life and remainderman in fee combine to sell settled property, it is thereby taken out of the settlement, and does not pass, and is not to be deemed to pass, on the death of the life tenant. And I think the result must be the same if, instead of selling, they combine to create a mortgage in fee upon the settled property. Pro tanto the property is taken out of the settlement, and what passes on the death of the tenant for life is the equity of redemption only, and the benefit accruing or arising in that event is in that equity alone. In the present case the mortgage was antecedent to the settlement under which the appellant derives his present title in remainder. But it is said that the conveyancing arrangements in the present case, by which the incumbrances on the

(1) [1899] A. C. 53.

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life estate were purposely kept alive for the better security of the mortgagees, prevented any union of the life estate and remainder in them, and that they were not mortgagees on the fee in possession during the second Earl's lifetime.

"It is the existence," says Collins L.J., "of this mortgage (on the life estate) so kept alive and determining, so far as it was a charge on the life estate, on the death of the second Earl Cowley, that is decisive in favour of the Crown in this case." With the most sincere respect for the learned judges in the Court of Appeal, I find myself unable to concur in this view, which seems to me to overlook the substance and real character of the transaction.

The joint power created by the disentailing deed was the appropriate machinery for enabling the parties to make a conveyance of their respective interests by a simultaneous act and so as to create one estate. By the exercise of that power a mortgage was created which was expressed to be, and intended to be, a mortgage on the fee, and, in my opinion, was a mortgage of the equitable fee, subject, of course, to all existing burdens.

There was no intervening estate or interest which prevented a union in the appointees of whatever equitable estate was left in the life tenant (subject to the charges thereon) with the equitable estate in remainder of the appellant. The money due to the holders of the incumbrances effected by the second Earl on his life estate was paid out of the mortgage money. If the matter had rested there, or if the incumbrances had been left outstanding and undischarged, there could not, in my opinion, have been any question that a mortgage was created on the corpus of the property, subject to the subsisting charges created by the will of the first Earl, and subject also during the life of the second Earl to whatever prior incumbrances, effected by him on his life estate, were subsisting. But the incumbrances were assigned to the Prudential Company, and this is said to make all the difference, and to be decisive of the case. I am really unable to understand how or why the rights of the mortgagees conferred by the exercise of the power were altered or (as is said) split into two mortgages, because, by a con-

veyancing device, they had also a collateral right in case an undisclosed mesne incumbrance turned up to claim priority over it during the life of the second Earl.

I am, therefore, of opinion that the property in which the second Earl had an interest ceasing with his death was the equity of redemption only, or (in other words) his interest was in the income of the estate after deduction of the interest on the Prudential Company's mortgage (laying aside the paramount charges), and the benefit which accrued or arose on the second Earl's death under s. 2 sub-s. 1 (*b*), if the case falls under that sub-section, was the principal value of that income only, or, shortly, the value of the equity of redemption.

All the learned judges in both Courts below, except perhaps Rigby L.J., have agreed that s. 7 sub-s. 1 applies only to the case of an estate passing from a deceased owner subject to his debts and incumbrances. That sub-section is not an easy one to construe, and I am not satisfied that I have quite mastered the meaning of it, but I do not think that it applies to the present case.

There is only one other point I wish to mention. The policies which formed part of the security of the incumbrancers on the life estates were assigned to trustees upon trust to apply the proceeds on the death of the second Earl in reduction of the Prudential Company's mortgage, and not, as Smith L.J. seems to have thought, to the Prudential Company themselves. No claim to estate duty on the proceeds of the policies, or to deduct the proceeds of these policies from the mortgage debt, is made by the Attorney-General in this appeal, and no argument was addressed to your Lordships on the point. Consequently, no opinion is expressed or implied upon it in the decision of this case.

As to the other point—whether the appellant is entitled to any deduction in respect of the cesser of the rent-charge of 3000*l.* a year to which he was entitled during the second Earl's lifetime—I agree with your Lordships that he is not entitled to that deduction, and I need not repeat the reasons which have been given.

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EARL OF HALSBURY L.C. My Lords, before putting the question I think it right to add that Lord Herschell authorized me to say that he concurred in the conclusion at which your Lordships have now arrived.

Order appealed from reversed and order of the Queen's Bench Division restored with costs here and below. (1)

Solicitors for appellant: *Collyer-Bristow, Russell, Hill, Curtis & Dods.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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LACEBY . . . . . APPELLANT.

AND

E. LACON & CO., LIMITED, AND THORNTON AND OTHERS, JUSTICES . } RESPONDENTS.

Licensing Acts—Licence—"Off Licence"—Order sanctioning Removal—Application for New Licence—Notice of Application—Licensing Act 1872 (35 & 36 *Vict. c.* 94) *s.* 50.

The holder of an "off licence" for the sale of beer, wine and spirits in respect of certain premises applied at the general annual licensing meeting for a renewal of that licence. He also applied for a new licence of a similar description in respect of other premises, having given the notices requisite in applications for new licences, but not those requisite in applications for orders for removal. The licensing justices granted the application for the new licence on condition that he gave up the licence for the first-mentioned premises and ceased forthwith to carry on the sale of beer, wine and spirits there. The applicant agreed to do this and the new licence was granted:—

Held, that this was neither in form nor in substance an order sanctioning the removal of a licence, and that the justices had an absolute discretion to grant the new licence.

The decisions of the Queen's Bench Division and Court of Appeal (*Reg.* v. *Thornton, Ex parte E. Lacon & Co., Limited*, [1897] 2 Q. B. 308; [1898] 1 Q. B. 334) reversed.

FOR some years the appellant had held an "off" licence for beer, wine and spirits in respect of the house No. 567 Battersea

(1) The order had not been drawn up when this report went to press.

Park Road, known as the Five Alls, and also an "off" licence for beer, wine and spirits in respect of the cellar only of the adjoining house 2 Abercrombie Street, there not being enough cellar accommodation in the Five Alls. At the general annual licensing meeting held on March 5, 1897, for the Wandsworth division in the county of London the appellant applied for a renewal of each of these licences, having given the notices requisite in respect of renewals. These applications were not opposed. He also applied for a new "off" licence in respect of the whole of 2 Abercrombie Street, having given the notices requisite in the case of new licences. In reply to a question from the justices the appellant undertook, in the event of the licence being granted to the whole of 2 Abercrombie Street, to give up the licence of the Five Alls. Thereupon the justices decided to view the premises and the application was adjourned. At the adjourned meeting on March 26 the application was opposed by counsel on behalf of E. Lacon & Co. Limited, the appellant's lessors of the Five Alls. The justices, having viewed the premises and being of opinion that the Five Alls was too small for the present requirements and that 2 Abercrombie Street when altered in accordance with the plans would be more suitable for public requirements, announced that they would remove the restriction of the licence for 2 Abercrombie Street on the appellant's surrendering the licence for the Five Alls and undertaking to cease the sale of beer, wine and spirits on those premises. The appellant agreed to do so, and the new licence for the whole of 2 Abercrombie Street was granted. It appeared that the licences in respect of the Five Alls and the cellar of 2 Abercrombie Street had been formally drawn up at the meeting of March 5, but it did not clearly appear from the affidavits whether those licences had been actually then renewed by the justices.

A rule nisi for a certiorari was then obtained to remove into the Queen's Bench Division and quash the order for the new licence for 2 Abercrombie Street on the ground that the justices had no jurisdiction to make it, because (inter alia) it was in effect an order of removal under s. 50 of the Licensing Act 1872, and the appellant had not complied with the requirements

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of that section and had given no notice of his application to E. Lacon & Co., his lessors of the Five Alls. This rule was made absolute by Cave and Ridley JJ. (1), and their decision was affirmed by the Court of Appeal (A. L. Smith, Chitty and Collins L.JJ. (2))

March 16, 17, 20. *Bosanquet Q.C.* and *J. C. Earle* for the appellant. First, this was not in form or substance an order for a removal or an order sanctioning a removal. Secondly, if it was a bad order certiorari does not lie to quash orders of justices sitting to grant licences. First, the appellant did not apply for an order of removal or desire one. He wanted licences for both premises and applied for both. New "off" licences for wine and spirits must be granted to qualified persons: the justices cannot refuse them; and the appellant was qualified. By 23 Vict. c. 27 s. 3, any person who keeps a shop, &c., is entitled to take out an "off" licence for wine. Sect. 4 of 32 & 33 Vict. c. 27 says no licence for the sale by retail of beer, cider or wine shall be granted unless the justices grant a certificate, and by s. 8 no application for a certificate shall be refused except upon one or more of four grounds, which do not apply here. By 24 & 25 Vict. c. 21 s. 2, any person duly qualified may take out an "off" licence to sell spirits by retail. By the Licensing Act 1872 (35 & 36 Vict. c. 94) s. 69, "off" licences to sell spirits by retail are put on the same terms as were enacted for "off" licences for beer, cider or wine by 32 & 33 Vict. c. 27. Therefore the justices were bound to grant the new licence in respect of wine and spirits. As to beer, by 11 Geo. 4 & 1 Will. 4 c. 64 s. 2, every householder might have a licence, "on" or "off," for a beer-house. As has been already seen by 32 & 33 Vict. c. 27 s. 8, the justices could not refuse a certificate for an "off" licence for beer except upon one or more of four grounds not applicable here. When the Licensing Act 1872 was passed any person not specially disqualified was entitled to an "off" licence for beer in respect of any premises not specially disqualified. By 43 Vict. c. 6 s. 1, s. 8 of 32 & 33 Vict. c. 27 is repealed as to

(1) [1897] 2 Q. B. 308. (2) [1898] 1 Q. B. 334.

the grounds for refusing a certificate for a beer licence, and the justices may refuse it on any grounds according to their discretion. By 45 & 46 Vict. c. 34 s. 1, the justices may "in their free and unqualified discretion" refuse or grant a certificate for an "off" licence for beer. This section therefore by implication repeals s. 50 of the Licensing Act 1872 as to an order for removal, the matter being in the absolute discretion of the justices. The beerhouse keeper's right to a licence is repealed, and the statutory restriction on removals imposed by the Act of 1872 is also repealed: all personal rights are gone on both sides: there are no parties and the justices are not bound to hear any person on that question. The new licence for beer in this case therefore was a matter in the absolute discretion of the justices, they granted it, and it cannot be impeached. The statute has not said a tenant cannot give up a licence without the consent of the owner of the house. It is a general practice in country districts to require a surrender of a licence before a new licence will be given for new premises to the same man, but the justices can if they think right say nothing about a surrender and in the end grant the new and refuse the renewal. The procedure as to the grant of a new licence is entirely distinct from that as to removal.

[The arguments used and authorities cited on both sides of the question whether certiorari lies to bring up and quash an order made by justices sitting as licensing justices are omitted, their Lordships pronouncing no opinion upon that question.]

Lawson Walton Q.C. and *Foote Q.C.* (*Travers Humphreys* with them) for the respondents. In effect and fact the order of the justices was a removal and therefore prohibited by the Licensing Act 1872 s. 50 without the owner's consent. "Removal" means nothing more and is nothing more than giving up business at the old premises and transferring it to the new and carrying it on there. The fact that the suggestion as to the surrender of the old licence came from the justices makes no difference: the appellant would certainly have given up the business at the Five Alls: he would not have kept it up at two adjoining houses: no doubt he always intended to give up the old licence, and chose a method of doing it behind the owner's

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back which might pass without notice. Such a proceeding has two effects, it deprives the old premises of great value and it endows the new. True, there is here no order of removal in form. But the Legislature cannot have meant that the justices should grant a renewal of the old licence and then issue another document stating that the licence was removed. It was intended that there should be only one licence, that for the new premises. There was therefore here everything that was necessary to constitute an order of removal. Under s. 48 of the Act of 1872 forms of licences may be prescribed by a Secretary of State; forms for various licences have been prescribed, but none for an order of removal: see Paterson's Licensing Acts. The justices began here by renewing the old licences for the Five Alls and the cellar of 2 Abercrombie Street, for that is the real effect of the affidavits. Once renewed those licences were irrevocably renewed: the licence for the Five Alls could not be surrendered; it could only be removed. The fact that the justices called it a surrender and not a removal could not prevent its being a removal. Moreover by 3 & 4 Vict. c. 61 s. 1 no licence to retail beer can be granted to any but the real resident holder and occupier of the dwelling-house. The appellant could not reside both at the old premises and the new at the same time. And independently of that the appellant was not qualified as to the new premises.

Bosanquet Q.C. in reply.

EARL OF HALSBURY L.C. My Lords, I am glad, out of respect to the two Courts below, from whom this question has come, that the matter has been so elaborately and carefully argued; but I confess for myself I cannot, now that the matter is fully before me, entertain any doubt as to the conclusion at which your Lordships ought to arrive. I quite admit that during a considerable part of the argument, before my mind was sufficiently alive to the provisions of the Act of 1872, I was very much impressed by the argument which seems to have found favour with the Courts below, because the transaction seemed to me, having regard to s. 50, to be, what I think two of the learned judges say it was, doing by an indirect

performance that which the Legislature had prohibited, namely, the removal of a licence from a house occupied by a tenant, against the will of his landlord, to some other house where he could carry on his business at the sacrifice of the landlord's interest in the former house. Without such a careful examination of the Act of Parliament as we have now had, that would be the first impression of a person reading these sections: it might be considered that the Legislature had provided for the interest of the landlord by making the landlord's dissent an absolute bar to the proceeding by the magistrates by way of removal.

Upon a careful examination, however, of the statute it appears to me that s. 50, upon which reliance is placed, is a section which, whatever may have been its original design, has under the statute no machinery and no provision which can effectually prevent the grant of new licences, and I do not believe that the Legislature ever contemplated that such a bar should be placed in the way of the jurisdiction and discretion of the magistrates as would be involved in permitting the mere refusal of the owner of the premises, as distinguished from the tenant of the premises, to prevent the magistrates exercising their discretion in the matter. I can well understand that, given a current licence and given some proceeding whereby the current licence should be removed to other premises, the Legislature would have prevented the tenant sacrificing his landlord's interest by a proceeding in which the landlord himself was not represented. That is on the one hand clear enough. When I find that the only application for a removal must be made at the general licensing sessions, and when I observe, what has been so often pointed out to us, the interval between that date, March 5 and April 5, when the new licence must begin, I confess I am wholly unable to see what useful object can be performed by that section, or what protection to anybody is thereby given.

But, my Lords, as regards renewals and new licences it is obvious that neither this Court nor any other Court can supply machinery or provisions which the statute itself has not enacted. If the Legislature intended that there should be some protection

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during the currency of the licence and intended that the landlord should be represented, all one can say is that no such provisions can be found in the statute, and your Lordships have no jurisdiction to supply them. What is clear is that by this Act of Parliament, and by the others to which the learned counsel have called our attention from time to time, what the Legislature has ultimately done has been to give an absolute unfettered discretion to the magistrates. Certainly it would be a very singular result of that legislation if upon a new licence being applied for, the magistrates being invested, as by the hypothesis they are, with an absolutely unlimited discretion, the mere veto of the person who owns the premises held by a licensed person, which licensed person was applying for a licence for other premises, should prevent the magistrates granting a perfectly new licence to new premises, and that that bar should exist because the applicant had before that held other premises under another licence. That would be a very singular result indeed, and certainly, unless there was something very clear in the statute to compel me to come to such a conclusion, I should absolutely refuse to assume that the Legislature had done so.

But it is not necessary for your Lordships to consider that, because the question here is whether or not anything has been done which the justices were not at perfect liberty to do. It must be made out before any such order could be made and maintained as has been made by both the Courts below that the magistrates acted without jurisdiction.

Now, I quite follow what Mr. Lawson Walton and Mr. Foote have so ingeniously and earnestly pointed out, that the result arrived at may be the same as would have been arrived at by a "removal." Granted. But what then? The thing that the magistrates have done is not the thing which is contemplated by the 50th section; that is to say, not the same as regards the actual order. Whether it is the same thing in substance or not I will treat of in a moment, but it is not the thing. What they have done is, they have licensed premises, and that licence does not purport to be, and is not certainly upon the face of the instrument, the former licence which existed of the Five Alls,

but it is an absolutely new licence. What the Legislature meant by the "removal of the licence" I can only conjecture, but I should think it would mean that a licence which had existed in one house should be, as indeed the phrase implies (it is not a very happy one), removed to another house. If any order was asked for upon that subject it is to be remembered that whatever discretion the magistrates have they are limited in the orders they make by the language of the statute, and if they wanted to make such an order as that they must make the order accordingly. It is all very well to say that it may come to the same thing; but where the magistrates are fettered by a statute which enables them only to act in a particular way, they must abide by that way. Here the magistrates on the affidavit laid before us say they were not asked to make an order for removal, and did not suppose they were making an order for removal; and when we look at the document itself there is no such thing as an order for removal to be found in the whole course of the proceedings, and yet your Lordships are asked to say that these proceedings are without jurisdiction; because, although everything that the magistrates did and everything that they intended to do was within their jurisdiction, it is said the effect produced is just the same as if they had made some other order which they never did make and never intended to make, and by this circuitous process of reasoning it is to be supposed the magistrates acted outside of their jurisdiction.

My Lords, the observation immediately arises that where you are dealing with a subject-matter of this sort the form is part of the substance. It is a delusion to suppose that magistrates may do what may be equivalent to this, that, or the other. They are within the iron framework of a statute, and they have no jurisdiction to go beyond it. All that they did do, and all that they intended to do, was that they licensed a person to occupy new premises for the purposes contemplated by the statute.

My Lords, I decline to go into the question of whether or not, if there was anything erroneous in the order which the magistrates made, the proper form of remedying that error has

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been adopted. I confess I should require further argument before I hastily came to the conclusion that this was the proper form, but I decline to enter into the question or give any opinion upon the subject. If the question hereafter arises whether certiorari is the proper remedy or not, then will be the proper time to decide it; but inasmuch as upon any hypothesis it can only be by some error in the proceedings, and inasmuch as I am of opinion that there is no error here at all, but that the magistrates have proceeded strictly within their jurisdiction, I am of opinion that this order of the Court of Appeal, confirming the order of the Court below, ought to be reversed, and I accordingly so move your Lordships.

LORD WATSON. My Lords, the Legislature have enacted that the licensing justices shall not remove (whatever that may mean) a licence from one set of premises to another unless the owner of the house which is about to be deprived of the licence is called as a party to the proceedings for his interest, and unless he consents to the order being pronounced. In the present case I think the only question is whether such an order has been pronounced. I do not think it is enough to bring the case within the statutory requirement of the presence of the owner of the house that the proceedings of the justices shall be attended with precisely the same consequences as if they had been asked to make, and had in point of fact made, an order of removal. It is not enough to say, as some of the judges have said, that the two things are in substance the same. It is not enough to say that the result of either proceeding must be the same. The Court must come to the conclusion, in order to bring the matter within the statutory prohibition, that what has been done is one of the things which the Legislature have prohibited.

Now, my Lords, I need not repeat what has been already said by my noble and learned friend the Lord Chancellor, but in the present case it appears to me that in construing, as one must do, that clause, which is not easy of construction, the 50th section of the Licensing Act of 1872, an order of removal never was contemplated by any of the parties to this case. It

was not applied for; it was not intended to be granted by the licensing justices; and when one examines what they have done it amounts to the destruction of one licence and the continuance and enlargement of another. That is, to my mind, entirely opposed to what is the plain meaning of the statute in using the word "removal," which signifies that a licence shall be transplanted from one set of premises and serve as a privilege and protection to another set of premises—it may be to a set of premises in a different licensing district. In those circumstances I do not think the respondents in this case were entitled to any remedy. I do not think that they have shewn facts requiring any remedy, and therefore I think it quite unnecessary to discuss in what form the remedy ought to have been granted if it had been required.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I am of the same opinion. In this case an application is made for a certiorari on the part of the respondents to remove into the Queen's Bench Division an order for a licence of 2 Abercrombie Street in order to have it quashed. That licence on the face of it is a perfectly valid licence, because it is a licence granted by persons competent and having jurisdiction—it is a licence to carry on in the house 2 Abercrombie Street the business of sales for consumption off the premises.

Then what is the objection to that licence which is good upon the face of it? It is said that although it is a licence on the face of it as a grant for a new licence, yet it amounts to an order for a removal. Sometimes it is said "in substance," sometimes it is said "in effect," and sometimes it is said "the consequences are the same," but the argument is that it amounts to an order for a removal under s. 50 of the Licensing Act. As I have said, on the face of it it does not purport to be anything of the sort; it purports to be what it is—a grant of a new licence. The Act of 1872 contemplates licences being obtained and granted under three sets of circumstances. By s. 40 it contemplates the grant of new licences; by s. 42 it contemplates the grant of renewals; and by s. 50 it contemplates

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the grant of a "removal" of a licence, which I would understand from the use of the words "removal of the licence" to refer to a licence then in esse. In this case the proceedings have not been taken merely under s. 50. The applicant never applied for a removal—he applied for a renewal—he also applied for the grant of a new licence to the entire of No. 2 Abercrombie Street. Why is he to be held as having applied for a grant of a "removal" when he did not do it? As a matter of fact he did not take the proceedings for that. There are three different applications dealt with by the statute. There are three different sets of notices to be given by the statute; there are three different results to be arrived at by the statute. The first is renewal, the second is a grant of a new licence, and the third is an order for removal. Why is it to be persevered in that he must be held to have applied for that which he did not apply for? Why is it to be held as against the magistrates that they made an order, which they did not make, for a removal under s. 50 because, forsooth, the consequences may be practically the same as if that proceeding had been taken? That is a matter for legislation. This House, as one branch only of the Legislature, is not entitled to legislate. If it is suggested that this protection to brewers and their houses should be extended to the case of renewals, and to the case of a grant of new licences, it is for the Legislature to say so. The Legislature have confined the protection to the case of removal. Suffice it to say that this is not a case of removal. If it were not for the very great respect which I have for the Courts that have decided the opposite, I would have said that it was a very plain case indeed.

Order appealed from reversed with costs here and below. (1)

Solicitors for appellant: *W. W. Young & Son.*
Solicitor for respondents: *Wellington Taylor.*

(1) The order had not been drawn up when this report went to press.

[HOUSE OF LORDS.]

MESS . . . . . APPELLANT; H. L. (Sc.) 1898 Nov. 28.

AND

HAY . . . . . RESPONDENT.

Bankruptcy—Trust for Creditors—Right in Security—Pledge—Preference—Private Manager.

By trust deed executed July, 1895, S., a farmer, conveyed his whole estate to M., "as trustee and in trust and as my commissioner (but hereinafter called trustee) for the uses, ends, and purposes after specified," "with full power to manage the farm until expiry or renunciation of the lease, to sell the stock, &c., to sue and defend actions, pay rent and wages, and out of the remainder pay the creditors" of S.; "or if the remainder was inadequate, to call for claims and divide the sums." S. was declared bankrupt July 10, 1896. M. claimed a preferential right to be paid a balance due to him in respect of his actings in the management of the farm. He alleged that at the date of the bankruptcy he held the whole estate in security and for payment of his advances, expenses, and remuneration as trustee, and claimed full payment of his debt. And in virtue of his having paid for the seed and labour of sowing and caring for the crop of 1896, he specially claimed to be preferred to the whole sum arising from the realization of the crops, or such part as would recoup him for his expenses, advances, and remuneration. The trustee rejected M.'s claim so far as it included law expenses after the date of the bankruptcy and other small sums, and under deduction of these sums the trustee admitted M.'s claim to be an ordinary debt, rejecting the debt altogether as a preferable one:—

Held, affirming the decision of the Second Division of the Court of Session, that M. had no right to a preferable claim, on the ground that he had never held the bankrupt's estate in security, and that the payments made for seed and labour did not entitle him to a preferable ranking.

APPEAL from the Second Division of the Court of Session, Scotland (1), arising out of an appeal to the Court of Session at the instance of John Mess, the appellant, against a decision come to by Alexander Hay, as trustee in the bankrupt estates of Alexander Sime.

(1) (1898) 25 R. 398.

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The following statement of facts within inverted commas is taken from the opinion of Lord Watson:—

"This appeal is taken in the bankruptcy of Alexander Sime, tenant of the farm of Moncur, in the parish of Longforgan, and county of Perth, under a lease which expired at Martinmas, 1896. Sequestration was awarded on July 10, 1896, the date of the first deliverance being July 2, 1896; and the respondent, Alexander Hay, was duly appointed trustee. Accordingly, from and after July 2, 1896, the whole movable estate of the bankrupt became vested in the respondent, subject to such preferable rights and securities as were held by creditors.

"By a trust deed executed on July 26, 1895, Alexander Sime conveyed his whole estate, heritable and movable, to the appellant, John Mess, chartered accountant in Dundee, 'as trustee and in trust and as my commissioner (but hereinafter called trustee) for the uses, ends, and purposes after specified.' Full power was given to the appellant to enter upon and take possession of the estate conveyed, and to do everything which the bankrupt could have done before granting the conveyance. The leading purposes of the deed were (1.) that the appellant should manage the farm of Moncur, its cultivation and stocking, either until the expiry of the lease, if deemed advisable, or until renunciation of the lease, and to sell and convert into money the whole of the stock, crop, and implements as he might think fit; (2.) that he should have power to realize the truster's estates, both heritable and movable, on such conditions and such prices as he might think proper; (3.) that he should have power to sue and defend actions at law, or other proceedings for the recovery of or in relation to the estate; (4.) that he should pay out of the first and readiest of the estate and effects, rents, wages, and other preferable claims, and also expenses, including an allowance to the truster, and a reasonable gratification to himself; and (5.) that the appellant should, as soon as convenient, out of the remainder of the trust estate and effects, pay the debts of the whole just and lawful creditors of the truster, or, in the event of the remainder being inadequate for that purpose, to call for claims, and, on these being lodged, to divide the funds according to a scheme prepared by

him. The sixth, seventh, and eighth purposes deal with the right of creditors who may accede to the trust. By the ninth purpose the appellant was authorized to borrow money by cheque or from banks, or in any way he might think right. The remaining purposes related to questions of final accounting between the appellant and Mr. Sime or his representatives.

"The deed confers two separate appointments on the appellant, the one being that of factor or commissioner for the grantor, and the other that of trustee for the creditors of the grantor. By the terms of his lease of the farm of Moncur all assignees of the bankrupt, whether legal or voluntary, were excluded, as were sub-tenants, unless with the consent of the proprietor, as also 'all creditors or trustees or others acting for creditors.' In the absence of the proprietor's consent, which was not obtained, the assignment of his lease by the bankrupt to the appellant was inefficacious, and gave the appellant no right to possess the farm of Moncur or any part of it. On the record it is not disputed that during the period which elapsed between the execution of the trust deed and the issue of sequestration, the appellant acted in the management of the farm, sold and received the proceeds of crop, and made payments on account of taxes and rent, and also for labour, manure, and seed. No creditor of the bankrupt acceded to the trust, and there was therefore no beneficiary whom the appellant represented as trustee.

"The appellant, on March 10, 1897, lodged an affidavit and claim in the sequestration for a balance of 898*l.* 16*s.* 7*d.*, as due in respect of his actings and intromissions under the trust deed in the management of the farm of Moncur. He affirmed that at the date of the sequestration he held the whole estate falling under it, in security and for payment of his advances, expenses, and remuneration as trustee; and he claimed to be ranked preferably and primo loco upon the whole estate to the effect of receiving payment of the full amount of his debt. And, in virtue of his having paid for the seed and labour of sowing and caring for the crop of 1896, he specially claimed 'to be preferred to the whole funds arising from the realization of that crop, or to such part of the said funds as may be necessary for

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the purpose of recouping the deponent his expenses, advances, and remuneration.' " (statement 9).

The appellant further averred (statement 3) that he accepted the trust created by the said trust deed, and in virtue thereof immediately entered into possession and management of the whole estate and effects of Mr. Sime, and continued to possess and manage the same down to the sequestration of the estates; that the respondent knew throughout of the trust deed; that the landlord and his agent were also aware generally of the appellant's relation to the said Sime, and, notwithstanding the terms of the lease, took no steps to bring the same to an end; that (statement 5) the appellant, in virtue of the powers conferred on him by the trust deed and with the consent of the respondent, continued to manage Sime's whole affairs, and, in particular, (1.) by means of the said Sime, as farm manager, cultivated and cared for the farm from the date of the trust deed down to July, 1896; that in connection therewith he made numerous visits to the farm, and got other persons to visit and inspect the farm and advise the appellant as to the cropping thereof; that the appellant also paid numerous visits to the respondent, as the largest ordinary creditor, as to important points affecting the estate arising during the appellant's management; that (2.) the appellant paid, in addition to the rent, taxes, accounts, and wages, &c., for which the creditors were liable; he also gave orders for manure, coal, &c.; that (3.) he got the fire insurance policies over the stock, crops, &c., indorsed to himself, and effected fresh insurances; that he agreed in March, 1896, to make over the crops and furniture of the farm-house to one Johnstone for a bill for 500*l.*, which bill the appellant retired on maturity; that (4.) the landlord raised various actions against the said Sime during the appellant's management, and that other creditors also raised actions which the appellant as trustee attended to; that (5.) the appellant corresponded with all the other creditors, and arranged that they should hold over their claims.

The respondent admitted that the appellant acted as alleged in the management of the farm, received payment of the produce of the farm, paid taxes and accounts, and ordered

goods, insured the farm stock, and litigated in Sime's name, but the respondent called for the correspondence with the other creditors. And he (answer 3 to statement 3) denied that the trust deed founded on by the appellant was made public or that the creditors acceded thereto; and further alleged that the appellant's actings in connection with the estate were as commissioner, or as factor and commissioner for Mr. Sime, and not as trustee, and that the appellant did not take possession of the farm under the lease.

"The respondent, on June 24, 1897, made a deliverance by which he rejected the claim to the extent of (1.) about 52*l.*, being the law expenses incurred after the date of sequestration; (2.) 12*l.* 0*s.* 11*d.*, expenses which had been paid by the proprietor of Moncur; and (3.) 58*l.* 16*s.* as an overcharge of remuneration claimed by the appellant. Under deduction of these items the respondent admitted a balance of 775*l.* 11*s.* 4*d.* to an ordinary ranking. He rejected the claim for a preference, on the ground that the appellant had never held the sequestrated estate in security, and that any payment made by him for seed and labour for crop of 1896 did not entitle him to a preferable ranking.

"An appeal against that deliverance was taken to the Court of Session, where, by order of the Lord Ordinary (Pearson) a record was made up and closed upon condescendence and answers. After hearing parties, the Lord Ordinary, by interlocutor dated 14th December, 1897, (1.) found that the averments of the appellant were not relevant to sustain the preference claimed by him in the sequestration, and sustained the respondent's deliverance in so far as it rejected said preference; (2.) affirmed said deliverance in so far as it disallowed law expenses, and the sum of 12*l.* 0*s.* 11*d.* paid by the proprietor of Moncur; with regard to the sum of 58*l.* 16*s.*, being the proportion of the appellant's remuneration disallowed by the respondent, before further answer, remitted to the Accountant of Court to inquire into the whole claim of the appellant for remuneration, and to report thereon; reserved all questions of expenses and granted leave to reclaim.

"Upon a reclaiming note by the present appellant, the Second

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Division of the Court, Lord Young dissenting, adhered to the interlocutor of the Lord Ordinary, and found the appellant liable in expenses since its date." (1)

1898. July 29; Aug. 1. *Balfour, Q.C.* (of the Scottish Bar), and *Edmund Robertson, Q.C.*, for the appellant. The appellant has well alleged entering into possession in the character of trustee before any bankruptcy occurred. The effect of the trust deed was to give the estate in security until the appellant was paid out of it. And the fact that the bankrupt had been employed to manage the farm made no difference: *North Western Bank* v. *Poynter, Son & Macdonalds* (2); *Macphail & Son* v. *Maclean's Trustee* (3); *Heritable Reversionary Co.* v. *Millar* (*M'Kay's Trustee*) (4); *Thomson* v. *Tough's Trustee.* (5)

Secondly, the principle of recompense was clear, namely, that where a person has undergone certain expenses, the costs of doing that is a first charge on the funds saved or secured: *Ex parte James, In re Condon* (6); *Ex parte Simmonds, In re Carnac* (7); *In re Opera, Limited* (8); *Ex parte Mutton, In re Cole* (9); *Kilpin* v. *Ratley.* (10)

Asher, D.F., and *J. D. Sym* (both of the Scottish Bar), (with them *Dumas*), for the respondent. The appellant is not a secured creditor; the only foundation for the alleged preferable right is the trust deed, but that deed was not a trust for creditors at all: it was a private deed to which the creditors did not accede. Further, the bankrupt continued in possession. If the appellant had completed his possession, he would have been tenant of the farm.

Secondly, as to recompense, this is not a case to which the principle of recompense applies; the appellant did everything here with full knowledge.

Balfour, Q.C., in reply. If the appellant, in good faith and

(1) 25 R. 398.
(2) [1895] A. C. 56.
(3) (1887) 15 R. 47.
(4) [1892] A. C. 598.
(5) (1880) 7 R. 1035.
(6) (1874) L. R. 9 Ch. 609.
(7) (1885) 16 Q. B. D. 308.
(8) [1891] 2 Ch. 154, 161.
(9) (1872) L. R. 14 Eq. 178.
(10) [1892] 1 Q. B. 582.

believing he was in possession, lays out 600*l.* on the production of a crop, then the person turning out to have the right to that crop cannot have its product without paying compensation, and that equitable right is the law of both Scotland and England.

The House took time for consideration.

1898. Nov. 28. LORD WATSON. [His Lordship having stated the facts as quoted above, continued :—]

A twofold question is involved in the terms of the interlocutor appealed from : (1.) whether the appellant is a creditor of the bankrupt for the full amount which he claims; and (2.) whether the debt due to the appellant is, to any and what extent, a preferable charge upon the sequestrated estate? The second of these questions is the more important, and is the only one which was seriously argued at the Bar of the House.

The judgments appealed from both affirm that the appellant is an ordinary creditor of the bankrupt for the sum of 775*l.* 11*s.* 4*d.*, being the balance due upon his intromission with and management of the crop and stocking of the farm of Moncur, the expenditure of the appellant upon rent, taxes, and other necessary payments, being to that extent in excess of his receipts. The bankrupt was possessed of no heritable estate, with the exception of his interest in the lease of Moncur, which was not carried to or vested in the appellant by the trust deed of July 26, 1895. The whole movable estate of the bankrupt, including everything which had been conveyed by the trust deed, became absolutely vested by force of statute in the respondent from July 2, 1896, the date of the first deliverance in the sequestration, subject only to such right of security or preference as the appellant might be able to make good in the sequestration. The immediate effect of the sequestration was to revoke any authority which the appellant might derive from the trust deed, and he had no longer any power to act in the administration, either on behalf of the bankrupt or of his creditors. No reason has been averred or shewn why the appellant should, after that date, have employed and incurred expenses

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to law agents; and in my opinion these expenses have been rightly disallowed by the Courts below.

The question remains, whether the sum which has been found due to the appellant, as increased by any addition which may be made thereto by the Court, on considering the report of the accountant, to whom the matter of the appellant's remuneration has been remitted, ought to form a first and preferable charge as claimed upon the whole estate and funds included in the sequestration. The appellant maintained that, at the date when the sequestration took effect, and his possession was superseded by the statutory title of the respondent, he had actual possession in security of his claims, and exclusive of any possession by the bankrupt, of the whole movable estate which has now passed to the respondent as trustee in the sequestration. That aspect of the case appears to have been chiefly pressed in argument before the Court of Session; and the judgments both of the Lord Ordinary and the Division went upon the ground that the appellant had not, in his record, stated facts and circumstances sufficient or relevant to infer that he had obtained such possession of the estate as would sustain a right in security. In this House, an alternative plea, said to be equitable, was argued on behalf of the appellant, and will be noticed hereafter.

It is not matter of controversy that, by the law of Scotland, in order to constitute a valid pledge of movables, there must be delivery of them to the pledgee, to the effect of vesting him with possession independent of the possession or control of the pledgor. Their joint possession will not suffice to create a right of security in the pledgee. There may be cases in which, so far as pleading is concerned, it is sufficient to allege possession in general terms; but there are others in which it is essential to a relevant averment of the pledgee's possession to set forth facts and circumstances from which his exclusive possession is matter of natural or necessary inference. When the movables forming, or intended to form, the subject of the security are stored in the premises of the pledgor, a simple averment of possession by the pledgee would be insufficient; but an allegation that these goods had been placed in a particular room, or

chamber, that the door had then been locked, and the key delivered to the pledgee, so as to give him the exclusive custody and control of them, would be equivalent to an assertion of actual possession, and would be admitted to probation.

The appellant on record (statement 3) alleges, in general terms, that he "accepted the trust created by the said trust deed and commission, and in virtue thereof immediately entered into the possession and management of the whole estates and effects of the said Alexander Sime, and continued to possess and manage the same down to the sequestration of the estates of the said Alexander Sime as before mentioned." He explains, with some minuteness in statement 5, his various acts in the cultivation and management of the farm of Moncur, and the payments made by him on account of rent and other charges; but these averments throw no light upon the character of his possession, if any, of the growing crops, stocking, and other articles which passed to the respondent as trustee under Sime's sequestration.

There are many circumstances in this case which, in my opinion, required that additional information should have been given by the appellant, if consistent with fact, in order to disclose exclusive possession by him of such a character as to raise a real right of security. It is not disputed that during the whole period of the appellant's management Alexander Sime, in compliance with the terms of his lease, remained in the personal occupation of the lands and steading which constituted his farm, and at the date of his sequestration the whole crops of the year 1896 were partes soli. It is idle to speculate by what possible devices, if any, exclusive possession, such as the law of Scotland requires, could have been transferred to a gentleman resident in Dundee, of furniture in the house at Moncur occupied by the bankrupt, of horses, cattle, or implements in his steading or on the farm, or of crops which were actually growing upon the land which was occupied by the bankrupt. There is no averment that any such devices were resorted to for the purpose of vesting the appellant with the exclusive possession of one or other of these things.

The position which the appellant held as factor for the

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bankrupt gave him ample authority to deal with the crops and stocking in the manner he alleges so long as his commission lasted, but did not give him any possession, exclusive of the bankrupt, which could sustain a right of security. Whether upon his receipt of money realized by the sale of crops or stocking, the appellant became entitled to retain it until he was relieved of advances made by him to pay rent and other charges, is a question which does not arise in the circumstances of this case, and need not, therefore, be discussed.

For the reasons indicated, I am of opinion, with the Lord Ordinary and the majority of the learned judges of the Second Division, that the averments made by the appellant in support of his claim, upon the ground that he held at the date of the sequestration a real security over the sequestrated effects, are not relevant.

The only point which remains to be considered is the second and alternative claim presented for the appellant, which was confined to the crops of the farm of Moncur for the year 1896, these constituting the greater part of the estate falling under the sequestration. The claim is formulated in the appellant's second plea in law, to the effect that, "The appellant having paid all expenditure connected with the crop of 1896, and cultivated and sown the same, is entitled to be recouped out of and from the proceeds of the said crop." The plea was rested, in the argument for the appellant, upon the doctrine of recompense, which is an intelligible principle of Scottish law, although, in my opinion, it is not applicable to the circumstances of the present case, and also upon the ground that the appellant was in equity entitled to recover as a charge upon the proceeds of the crop of 1896 his outlays for seed and labour. Assuming that the appellant under his contract of management with the bankrupt had not sufficient possession to support a right in security, in which case only the alternative plea is necessary, his legal claim was for a simple contract debt, due to him by his constituent, the bankrupt. To that extent his claim has been sustained. It is of no materiality that he may, as he alleges, have erroneously supposed that he had a right which, in reality, he never possessed. I am unable to conceive upon

what principle the insolvency of his constituent should enlarge his right, and give him a preference in competition with other creditors.

I am, therefore, of opinion that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs. The case must be remitted to the Court of Session in order that the amount of the appellant's remuneration may be fixed, and the expenses of process, prior to December 14, 1897, disposed of.

LORD SHAND. My Lords, I am also of opinion that the deliverance of the trustee on the sequestrated estate of the bankrupt Sime and the judgments of the Lord Ordinary and of the Second Division are sound and ought to be affirmed. The appellant is, of course, entitled to a ranking for the sum of 775*l.* 11*s.* 4*d.* as an ordinary creditor of the bankrupt as the balance due on his intromissions as commissioner or as trustee acting under the deed granted by the bankrupt of July 26, 1895, to which my noble and learned friend has fully referred; but an entirely different question arises under the appellant's claim to rank on the bankrupt estate as a preferable creditor.

The appellant was not at any time himself tenant of the farm. For obvious reasons he did not intimate the assignation of the lease which the bankrupt granted to the landlord, for the lease excluded assignees and trustees acting for creditors, unless with the consent of the landlord, which the appellant knew he could not obtain. In what he did the appellant acted in the employment of the bankrupt and as his agent or commissioner, although he was called "trustee" in the deed. He had no authority from the bankrupt's creditors to act for them, for the creditors were not asked to accede to any trust, and even the existence of any trust was not intimated to them. If he had taken the precaution of getting the creditors to adopt and accede to the trust, his right might have been very different.

The sole question in the case, then, is whether, when

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bankruptcy arose on July 2, 1896, the appellant had any preferable right or security over the bankrupt's estate to which the trustee in the sequestration was bound to give effect. There is no deed in existence constituting such a right or security. Had the appellant, then, such possession of any part of the estate stipulated for and obtained as a security for his advances as to give him a preference over the other creditors? I agree with my noble and learned friend that there was no such possession, and that the possession of the appellant was all along that of the bankrupt, by his authorized agent or commissioner, and not possession excluding that of the bankrupt.

As to recompense, the ground of judgment of the learned judge who differed in opinion in the Second Division of the Court, I can see no room for giving effect to the appellant's argument. It seems to me that in making the outlays he did, and in seeing to the application of the money he advanced, the appellant, having no such possession of the crop, stocking, and movables on the farm as excluded the possession of the bankrupt, was simply lending money and giving his services to the bankrupt under the arrangement that he should be factor or commissioner for the bankrupt appointed by the deed of July 26, 1895, and that, this being so, he has no ground for a claim of recompense against the general creditors. His position is not indeed different in substance from creditors who have lent money or sent goods to a bankrupt of which the general creditors take the benefit on bankruptcy. There is no room for the suggestion that there was exclusive possession on a title which gave the appellant ground to believe that he had a claim against anyone but the bankrupt for whom and on whose authority he was acting, and so there is no room for a claim on the ground of recompense.

LORD DAVEY. My Lords, I have had an opportunity of seeing the judgment which has been delivered by my noble and learned friend, Lord Watson, and I so entirely agree with the reasons which he has given and the conclusion

which he has come to, that I do not find it necessary to add anything.

Ordered that the interlocutors appealed from be affirmed and the appeal dismissed: That the cause be remitted back to the Court of Session in order that they may in the first place fix the amount of remuneration due to the appellant, and in the second place determine the question of expenses of process prior to December 14, 1897, *and all other questions of expenses not disposed of by this House: And further ordered that the appellant do pay to the respondent the costs incurred in respect of this appeal.*

Lords' Journals, November 28, 1898.

Agents for appellant: *William Robertson & Co., for J. & D. Smith Clark, W.S., Edinburgh.*

Agents for respondent: *A. & W. Beveridge, for Carmichael & Miller, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1898 Nov. 22; Dec. 10.

VAUDA . . . . . APPELLANT;

AND

MAYOR AND COUNCILLORS OF NEWCASTLE . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Law 18 *of* 1897, *ss.* 5 *and* 6—*Construction—Licensing Officer—Right of Appeal—Jurisdiction of Supreme Court.*

Under Natal Law 18 of 1897, ss. 5 and 6, an appeal lies to the town council alone from a decision of its licensing officer.

No appeal lies from the decision of the town council. A summons for a writ of review thereof by the Supreme Court issued under Law 39 of 1896, s. 8, cannot in appeal be treated as for a writ of certiorari contrary to the plain intention of the parties and of the Court below.

APPEAL from a judgment of the Supreme Court (Feb. 1, 1898) dismissing, on the ground that the Court had no jurisdiction by way of appeal, a writ of review which had been granted to the appellant.

The facts are stated in the judgment of their Lordships.

The sections of Law 18 of 1897 which raise the question of jurisdiction are as follows:—

"5. A licensing officer shall have a discretion to issue or refuse a wholesale or retail licence, not being a licence under Act No. 38, 1896; and a decision come to by a licensing officer as to the issue or refusal of a licence shall not be liable to review, reversal, or alteration by any Court of Law, or otherwise than is in the next section provided.

"6. There shall be a right of appeal by the applicant, or any other person having an interest in the question, from the decision of the licensing officer to the town council or the town board, if the licence is sought for in a borough or township, or to the licensing board of the division appointed under the Liquor Act, 1896, if the licence is sought for elsewhere than in

* *Present:* LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

the borough or township; and the town council, town board, or licensing board, as the case may be, may direct that the licence, the subject of appeal, shall be issued or cancelled."

The Court by a majority considered that its jurisdiction was ousted by those sections by express terms as regards the decision of the licensing officer, and by necessary implication as regards the confirmatory decision of the town council. The Chief Justice, who dissented, said: "I understand the section thus—that you must not appeal direct from the licensing officer to the Supreme Court, but you must go first to the town council. Nothing in the 6th section prohibits an appeal from the town council."

Asquith, Q.C., and *Rufus Isaacs, Q.C.*, for the appellant, contended that, assuming the view of the majority to be right, there still remained the question whether the proceeding in the Court below was a proceeding by way of appeal or in the nature of a certiorari. The Supreme Court has an inherent right to interfere with such proceedings of the town council as are plainly illegal and improper.

Crackanthorpe, Q.C., and *Mayne*, for the respondents, contended that no case was made for a certiorari, and that the sole question was one of the Court's authority to entertain this appeal. Under the Act the discretion to issue or refuse licences rests ultimately in the town council; and the licensing officer's decision can only be reviewed by the town council, the power of the Court in that respect being expressly or by necessary implication negatived. [Reference was made to *Reg.* v. *London County Council.* (1)]

Isaacs, Q.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. It appears to their Lordships that there is no substance in the argument presented in support of the appeal.

The learned counsel for the appellant admitted that no appeal lies from the decision of the town council to whom and

(1) [1892] 1 Q. B. 190.

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to whom alone by sects. 5 and 6 of Law 18 of 1897 an appeal is given from the decision of the licensing officer appointed under that law. But they argued that the summons for a writ of review issued on January 19, 1898, under s. 8 of Law 39 of 1896 was not an appeal properly speaking but a proceeding in the nature of a writ of certiorari.

In attempting to avoid one peril obvious and fatal the learned counsel for the appellant seem to have exposed themselves to another almost equally obvious and certainly equally fatal. An application for a writ of certiorari is not granted as a matter of course. Some ground must be shewn. In the present case the appellant has not proved or even alleged any ground which could justify the issuing of a writ of certiorari or warrant any proceedings of that nature.

The summons of January 19, 1898, alleges four grounds for setting aside, amending, or correcting the proceedings of the town council—(1.) that the decision was "against the weight of evidence"; (2.) that the appellant had held a retail licence for seven years, "and he was not shewn to have forfeited his rights thereto"; (3.) that the town council "did not exercise a judicial mind in arriving at its decision"; and (4.) that the licensing officer was also clerk to the town council. As regards the first two objections, it is obvious that, however relevant and proper they might be in the case of an appeal on the merits, they are not relevant for any other purpose. The third objection is so vague as to be unintelligible without more. The fourth is apparently founded upon an entry in the record of the minutes of the proceedings of the town council, where it is stated that "at the outset" Mr. Laughton, the advocate for the present appellant and seven others in the same position, "desired that his protest should be recorded against any officer of the council being appointed to fill the position of licensing officer," and addressed "the council in support thereof." From that entry it would appear that the objection, originally at any rate, was not an objection to the town council exercising their jurisdiction under the circumstances (which certainly would not have been a very judicious topic "at the outset"), but merely a protest intended to diminish the weight of the decision of

the licensing officer as such, or to shew that there was some grievance in the connection between the licensing officer and the town council which might entitle the applicant to a favourable reconsideration of his case. It is difficult to see the force of the objection as applied to the jurisdiction of the town council. The clerk is not a member of the council. It does not appear that he took any part in the proceedings in any shape or way. It does not even appear that he was present when the appellant's case was heard.

In obedience to the exigency of the summons for a writ of review the minutes of the proceedings of the town council were put in on the appeal to the Supreme Court. No other evidence was offered by the appellant. It is not suggested that the record of those proceedings disclosed any ground for the appellant's application as an application for redress in the nature of a writ of certiorari. It appears from the note of the registrar of the Supreme Court that after the minutes of the proceedings of the town council had been read an objection was taken to the jurisdiction of the Court "to hear this review." The question of jurisdiction was then argued, and, after consideration, the Court dismissed the appeal, the Chief Justice dissenting.

Assuming that the appeal to the Supreme Court was in the nature of an application for a writ of certiorari, and founding themselves on one or two expressions in the judgments detached from the context, the learned counsel for the appellant maintained that the Supreme Court had laid down the proposition that under no conceivable circumstances could the Court interfere with the proceedings of the town council however improper their proceedings might be, and they asked their Lordships to express their opinion on that general proposition. For the purpose of the decision of the question before their Lordships it is not necessary to consider that proposition at all. It is not the province of this tribunal to debate or resolve academical questions. But in truth the Supreme Court laid down no such proposition as that to which the learned counsel for the appellant addressed themselves. Mason J., who gave the leading judgment, after saying that he "must hold that in

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these particular licensing appeals the jurisdiction of the Supreme Court is excluded," adds the following observation:—

"When either a licensing officer or a town council proposes to exercise powers with regard to trade licences which it does not possess the position of this Court would in all probability be very different; but that is not the state of circumstances which is brought before us in the present appeals."

Fennimore J. agreed with Mason J., though he arrived at the conclusion independently.

The confusion, if and so far as there is any confusion, arises from this—that in the argument at the bar the application for review was treated as an application in the nature of an application for a writ of certiorari, while before the Supreme Court it was treated by all parties as an ordinary appeal. The argument of the dissenting judge was that a direct appeal from the licensing officer to the Supreme Court was prohibited, but that there was nothing to prohibit an appeal from the decision of the town council. And that was the view which the majority of the Court set themselves to combat. Neither in the proceedings before the Supreme Court nor in the appellant's case is there the slightest trace of the view presented in the argument at the bar. Indeed, the substantial reason alleged in the appellant's case as the ground of the appeal was this: "Because the Supreme Court ought to have heard the appellant's application, and should have determined and decided the same upon the merits."

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Spyer & Sons.*

Solicitors for respondents: *Loughborough, Gedge, Nisbet & Drew.*

[PRIVY COUNCIL.]

BROUGHTON AND OTHERS . . . . . APPELLANTS; J. C.* 1898 Nov. 29.

AND

COMMISSIONER OF STAMP DUTIES . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Stamp Duties Acts of 1880 *and* 1886—*Probate Duty paid under Protest—Application for Refund—Delay.*

Where executors paid probate duty partly under mistake of law and partly with a reservation of their right to have the excess refunded without regard to delay, and it was subsequently decided in another case that no duty at all was payable as claimed:—

Held, that an application made nine years later for a mandamus to state a case for the Full Court was not brought within a reasonable time, and must be refused.

APPEAL from an order of the Supreme Court (Aug. 16, 1897) discharging a rule nisi for a mandamus directing the respondent to state and sign a case setting forth therein the grounds upon which his assessment of probate duty upon the estate of Broughton, who died in 1882, was made for the purpose of an appeal to the Supreme Court therefrom, raising the question whether the duty which had been paid in January, 1888, was properly paid or not.

Broughton died domiciled in Victoria. The appellants proved his will there. But part of his assets consisted of the sale proceeds of a station and stock in New South Wales which he had sold partly for cash and partly for promissory notes payable at Sydney, and collaterally secured by mortgages of the station and stock. The notes were at Sydney and the deeds in Victoria at the testator's death.

In November, 1886, the appellants applied for probate in New South Wales. The respondent, under the Stamp Duties Act of 1886 (50 Vict. No. 10), claimed duty on the value of the assets, thus including the notes, at the rate of 5 per cent.,

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the Act of 1880 (44 Vict. No. 3), in force at the testator's death, only authorizing 1 per cent. The appellants paid the duty demanded, it being arranged that if *Brodribb's* case (1), raising the same point, were decided against the Crown, the respondent would refund the difference between 5 and 1 per cent., notwithstanding that the statutory time for appealing should have passed. That case was decided in February, 1888, and after the decision of the Privy Council in *Commissioner of Stamps* v. *Hope* (2), the application for a return of the whole duty was made in reference to which this appeal arises. The reasons for discharging the rule nisi given by the Court below were that the special arrangement between the appellants and the Commissioner of Stamp Duties had reference to the decision of *Brodribb's* case (1), and that the delay of the appellants since the decision of that case has deprived them of the right of appeal to which they were (admittedly as regards the difference between 1 per cent. and 5 per cent.) entitled immediately after the decision of *Brodribb's* case. (1) As to 1 per cent., part of the amount sought to be refunded, a further reason was also given, namely, that the special arrangement in question applied only to the difference of duty between 1 per cent. and 5 per cent., not to the whole duty, and that, therefore, this 1 per cent. in any case was paid under a mistake of law and without special arrangement, and could not be recovered.

Cozens-Hardy, Q.C., and *Sargant*, for the appellants, contended that delay had not deprived them of their right of appeal. Under the Act of 1880 no time was limited for an appeal direct from any Commissioner of Stamps to the Supreme Court: see *Ex parte Mann.* (3) The appellants paid the difference between 1 and 5 per cent. under protest, and with a distinct agreement that the same should be refunded in the event of a decision at any time in their favour by the Supreme Court. It may, no doubt, have been made with special reference to *Brodribb's* case (1), then pending; but it was contended that expressly unlimited words of time ought not to be cut

(1) (1888) 9 N. S. W. L. R. 49. (2) [1891] A. C. 476.
(3) (1889) 11 N. S. W. L. R. 348.

down contrary to the words used to a limited time after the contemplated decision. The respondent was not in any way prejudiced by the delay; he rather benefited in the event of being ordered to repay without interest: see *Hope's* case. (1)

Swinfen Eady, Q.C., and *Vaughan Hawkins*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MORRIS. Their Lordships need not hear the respondent. They are of opinion that the judgment of the Supreme Court in New South Wales should be affirmed, and substantially for the reasons assigned in the judgment of Manning J. The application to state a case for the Full Court does not appear to their Lordships to have been brought within a reasonable time. The purport of the letter which has been so much relied upon, as assisting the case of the appellants, is obviously aimed at the decision which was then pending before the Supreme Court in *Brodribb's* case. (2) In that case the point here raised by the executors of Broughton, namely, as to whether the duty demanded by the commissioners from the executors should be at the rate of 5 per cent. or at the rate of 1 per cent., was discussed. It would appear from a subsequent decision, which it is immaterial for their Lordships to consider, that it was finally decided that duty was not leviable at all; but at the date in 1887 when the controversy arose the sole question between the parties was whether it should be at the rate of 5 per cent. or at the rate of 1 per cent. The money was paid at the rate of 5 per cent. by the executors of Broughton accordingly under protest, and with a reservation of their right to have the excess refunded, and also on condition that the delay should not tell against them. What delay? The delay appears pretty plainly to be the delay consequent on the decision in *Brodribb's* case (2), which was then pending. It is quite clear that the executors of Broughton themselves were not satisfied to raise the question at their own expense, and they must have been waiting for some decision which was

(1) (1890) 12 N. S. W. L. R. 220; S.C. [1891] A. C. 476.
(2) 9 N. S. W. L. R. 49.

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likely to be arrived at within some reasonable time. Such a decision was made in the year 1888, and nine years elapse from that time before the parties apply for a mandamus. During that period the executors entered upon a discussion with the commissioners in 1892 as to their right to a refund; they were refused in the year 1894. They then waited for another period—substantially eight or nine years—which appears to be a very unreasonable time at which to reopen this case, in which the money was apparently paid under a mistake of law.

Upon these grounds their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court of New South Wales should be affirmed.

The appellants must pay the costs.

Solicitors for appellants: *St. Barbe Sladen & Wing.*
Solicitors for respondent: *Light & Galbraith.*

[PRIVY COUNCIL.]

J. C.* 1898 *Nov.* 29; *Dec.* 10.

THE COMMISSIONERS OF TAXATION . APPELLANTS;

AND

TEECE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Land and Income Tax Assessment Act, 1895, *ss.* 27, 28, *sub-s.* 1—*Construction—Taxable Income.*

Under the New South Wales Land and Income Tax Assessment Act, 1895, s. 27, the taxable amount of the respondent's income was limited to the amount of its income derived from mortgages; under s. 28, sub-s. 1, certain expenses incurred by the taxpayer "in the production of his income" were to be deducted:—

Held, that by the true construction of the sub-section the respondent was entitled to deduct all expenses incurred in the production, not merely of its mortgage income, but of its income as a whole.

APPEAL from an order of the Supreme Court (Nov. 16, 1897) upon a special case stated under the Land and Income Tax

Present: LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Assessment Act, 1895 (59 Vict. No. 15), and the Income Tax Act, 1895 (59 Vict. No. 17).

The question decided was whether according to the true construction of s. 28, sub-s. 1, of the former Act the respondent (the public officer of the Australian Mutual Provident Society) was entitled to deduct from 161,599*l.*, the amount returned as income of the society derived from mortgages, the sum of 51,617*l.*, which he alleged represented the whole losses, outgoings, and expenses of the society incurred in the Colony in the production of its income from all sources within the Colony.

The commissioners disallowed the deduction of 51,617*l.*, but were willing to allow a deduction of so much thereof as could be shewn to have been incurred in the production of the society's income from mortgages only, that being the only portion of its income which was liable to the tax.

An appeal was preferred to the Court of Review, which decided in favour of the commissioners, but stated a special case on which the Supreme Court decided against them, holding that "income" in s. 28 meant "the whole income of the taxpayer arising from whatever source."

Swinfen Eady, Q.C., and *V. Hawkins*, for the appellants, contended that this decision should be reversed. "Income" in s. 28, sub-s. 1, meant such income as is dealt with by the Act—that is, income liable to taxation. The net income of the society derived from mortgages cannot be ascertained by deducting from the mortgage income expenses incurred in the production of all other kinds of income. According to the judgment appealed from, the respondent might deduct the expenses of farming land, or expenses incurred in the Colony for carrying on business in America. In short, the construction adopted by the Supreme Court confuses deduction with exemption, and leads to results which are unreasonable and inconsistent with the scope of the Act.

Upjohn, Q.C., and *Danckwerts*, for the respondent, contended that in all Acts imposing liability on the subject a strict construction as against the Crown should be adopted. If there is

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any ambiguity, that construction must be adopted which is most favourable to the public—that is, in this case the tax-paying public: see *Phillips* v. *Morrison* (1); *Partington* v. *Attorney-General* (2), per Lord Cairns; *Oriental Bank* v. *Wright* (3), per Lord Blackburn. The respondent's taxable income is its mortgage income after making deductions under s. 28, sub-s. I., which include all expenses incurred in making all its income. It is not competent to read taxable income or mortgage income where the Legislature has said income generally: see *New York Life Assurance Co.* v. *Styles.* (4)

Eady, Q.C., replied.

1898 *Dec.* 10.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The point to be determined in this case turns upon the language of the Land and Income Tax Assessment Act, 1895. The question is whether in order to arrive at the amount of their income chargeable with income tax the Australian Mutual Provident Society are entitled to deduct from their taxable income all the outgoings and expenses incurred in the production of their income, or only so much of those outgoings and expenses as may be properly attributable to that portion of their income which is taxable under the Act.

The society is a mutual life assurance society. The incomes of such societies with the exception of "income derived from mortgages" are by s. 17, sub-s. II., declared to be "exempt from income tax."

Sect. 27 contains rules for ascertaining the sum on which (subject to the deductions thereinafter mentioned) income tax is payable. The sum is termed in the Act "the taxable amount." It is not disputed that in the case of the Australian Mutual Provident Society "the taxable amount" is simply the amount of the society's mortgage income.

Sect. 28 declares that "from the taxable amount so ascertained as aforesaid every taxpayer shall be entitled to deductions in respect of the annual amount of—

"(I.) Losses outgoings including interest and expenses

(1) (1844) 13 L. J. (Ex.) 212.
(2) (1869) L. R. 4 H. L. 100, 122.
(3) (1880) 5 App. Cas. 842, 856.
(4) (1889) 14 App. Cas. 381, 409.

actually incurred in New South Wales by the taxpayer in the production of his income."

The interpretation clause (s. 68) defines "income chargeable" as "the taxable amount less the deductions allowed under this Act."

For the year commencing January 1 and ending December 31, 1895, the respondent society returned their income in respect of "interest on loans on mortgage in New South Wales" at 161,599*l.*, and the expenses incurred in the production of their income at 51,617*l.*, and they claimed to deduct the latter sum from their mortgage income, being the taxable amount of their income, thus leaving the difference between those two sums as "income chargeable."

The Commissioners for Taxation disallowed the claim, though apparently they were not unwilling to allow a deduction of so much of the society's expenses as could be shewn to have been incurred in the production of the society's "income derived from mortgages."

The society appealed to the Court of Review established under the Act, s. 9. From the decision of this Court, which was in favour of the commissioners, an appeal was brought to the Supreme Court on a case stated by the judge of the Court of Review. The Supreme Court on appeal reversed the decision of the Lower Court and answered the question submitted to them in favour of the society.

Darley C.J., with whom Simpson and Cohen JJ. agreed, was of opinion that the last words of s. 28, sub-s. I., "must receive their natural construction and mean the whole income of the taxpayer arising from whatever source and whether the Act exempts a portion or not." Although perhaps the illustration to which the learned Chief Justice resorts in support of his view may be open to criticism, their Lordships are of opinion that the principle of the decision is perfectly sound. It is obvious that the conclusion at which the Commissioners of Taxation arrived cannot be reached without introducing some limitation or some qualification which is not to be found in the words of the Act. The words "in the production of his income"—that is, in the production of the income of the tax-

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payer entitled to the deductions mentioned in the Act—in their natural and ordinary meaning, apply to the income of the taxpayer as a whole. Though it would certainly have led to a variety of nice and difficult questions, it might have been more logical, it might have been more in accordance with the fitness of things, it might have made the scheme of the Act look more symmetrical, if the taxpayer claiming deduction had been confined to deductions immediately connected with or properly attributable to his taxable income. But that is not what the Act says. And it is the duty of the Court to construe the Act as they find it.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Light & Galbraith.*
Solicitor for respondent: *George Slade.*

[PRIVY COUNCIL.]

J. C.* 1898 *Dec.* 2, 16.

CROUDACE . . . . . DEFENDANT;

AND

ZOBEL. . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Appeal from Interim Injunction—Trespass — New South Wales Mining on Private Lands Act, 1894, *ss.* 8, 13—*Gold Lease Application.*

Appeals from interlocutory injunctions, of an essentially temporary kind, will not be encouraged.

Where an interim injunction had been granted restraining the appellant from trespassing or mining upon land covered by the private gold lease application of the respondent, who under s. 8 of the New South Wales Mining on Private Lands Act, 1894, had obtained a miner's right and

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* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

authority, and under s. 13 had made application not yet granted at date of suit for a twenty years' lease :—

Held, that the respondent, having a definite statutory right to apply for a lease, had a locus standi to apply for an injunction which should be maintained till discharged by the Court.

APPEAL from an order of the Supreme Court (Aug. 24, 1897) dismissing the appellant's application to set aside a writ of injunction granted by Stephen J. on an ex parte application by the respondent in chambers.

The question raised by the appellant was whether a person who has duly applied under the Mining on Private Lands Act No. 32 of 1894 for a lease of private land, whereof the grants from the Crown contain no reservation of minerals other than gold, for the purpose of mining for gold thereon, is entitled, before any lease has been granted to him, to obtain an injunction to restrain the owner of such private land from mining thereon in any manner and for any purpose.

The terms of the injunction were that the appellant and the men employed by him were enjoined and commanded that they should thenceforth altogether and absolutely desist from trespassing or mining on the said land until the Court should order to the contrary.

The decision of the Supreme Court proceeded mainly on s. 10 and the interpretation clause. "The intention," said the Chief Justice, "of those sections is, I think, that neither the person who has applied for a lease shall commence to mine until his lease is granted, nor that the owner who has not applied for a lease shall conduct any mining operations upon any land which is the subject of an application by some one else. If the owner does so mine on land with respect to which he knows that an application for a lease has been made he is doing a special injury to the applicant, which this Court has power to prevent."

Crackanthorpe, Q.C., and *Lindley*, for the appellant, contended that the Supreme Court was wrong in refusing to set aside this injunction. The company, whose manager was appellant, was the owner of the land in question. Its grants

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from the Crown contained no reservation of minerals other than gold. The company, therefore, was entitled to mine on its own land for any purpose other than gold; and consequently s. 10 of the Act of 1894, on which the Supreme Court based its decision, did not apply. Under an amending Act passed in 1896, s. 9, the company was entitled to mine on the land for minerals other than gold, notwithstanding that gold may be associated with such minerals if such gold does not exceed 50 per cent. of the value of such minerals. Besides, the respondent had not shewn any interets in the land to entitle him to an injunction; whether to restrain the appellant from trespassing or mining generally, or from mining otherwise than for gold. As the holder of a miner's right he had obtained, under s. 8 of the Act of 1894, authority to enter thereon, and had applied for a lease for the purpose of mining for gold. But the period of authority had expired before action brought, and the lease had not been granted, and the Governor, under s. 22, was under no obligation to grant it. It was contended that the injunction was an unauthorized interference with the appellant's right.

The respondent did not appear.

1898
Dec. 16.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. On March 20, 1897, the Supreme Court granted an interlocutory injunction to restrain Croudace, the defendant, now appellant, from trespassing or mining upon the land covered by the private gold lease application of the plaintiff Zobel, who is now respondent, but has not put in any appearance. The injunction runs till further order. The defendant, without waiting for the hearing, seeks to dissolve it at once.

The plot of land in question is twenty acres in extent, and forms part of an estate belonging to a mining company, whose manager is the defendant, under a grant from the Crown which did not reserve any mineral except gold. In 1896 the plaintiff obtained a miner's right and an authority under s. 8 of the Mining on Private Lands Act of 1894; and on August 3, 1894, he made application for a twenty years' lease under s. 13

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of the same Act. He has defined the boundaries of the plot, and has done the other things necessary to obtain a lease, but his application had not been granted at the date of the injunction. The defendant's company for some time got copper from the land, but they found the working unprofitable, and discontinued it for several years. Some weeks after the plaintiff's application for a lease they resumed working, and consequently the plaintiff applied for an injunction to restrain them.

The defendant's first objection is that the plaintiff has no interest to protect. It is true that the authority which he obtained under s. 8 has done its work, and that he has not acquired the interest of a lessee. But he has a definite statutory right to apply for a lease, which he has exercised, and his possibility of getting that lease gives him an interest to oppose operations which may have the effect of injuring or even of destroying the subject-matter of his application while it is yet pending. On this point, therefore, their Lordships have no hesitation in agreeing with the Court below.

That being so, it seems to their Lordships that, applying the ordinary test of greater or less convenience, this case is one in which the gold-miner's interest should be protected either until his application for lease is disposed of, or until the Court sees other reason to discharge the injunction; and Mr. Crackanthorpe has not persuaded them that the injunction ought not to be maintained on that ground alone.

As there is sufficient ground for refusing to disturb the order, their Lordships will not go out of their way to decide anything on the very difficult questions arising under the 10th section of the Act. As Darley C.J. points out, the New South Wales Legislature have created rights of a novel description, and also of a complicated kind; and it is not surprising to find that the framers of the Act have either failed to foresee the questions that would arise, or to put their views on them into clear language. If and when necessary the problem must be solved. This, however, is not an appeal from a final order, but from an interlocutory one of an essentially temporary kind for interim protection, and their Lordships are not at all

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disposed to encourage such appeals. Probably the certificate was given in the Court below, because their decision was rested on a certain view of s. 10 of the Act of 1894. But if it is right on any view of that section to grant the injunction, there is no obligation to decide whether the view actually taken is correct or not, and their Lordships prefer to express no opinion on it.

It is also to be borne in mind that this appeal is undefended; and that their Lordships are very cautious in examining decisions of Colonial judges upon matters which are of peculiarly local import, and familiarity with which gives peculiar facilities for drawing right conclusions. Neither of these considerations is the fault of the defendant; but they serve to increase their Lordships' reluctance to construe a doubtful statute when no obligation lies on them to do so.

Mr. Crackanthorpe also relies on s. 9 of the Act of 1896, which allows owners of land to work minerals not reserved to the Crown, notwithstanding the presence of reserved minerals —in this case gold—if the value of the gold does not exceed 50 per cent. of the value of the minerals not reserved. Here it is said the value of the gold is less than 50 per cent.

The defendant distinctly raised this question in his pleas and in his affidavits, and it is not met by the plaintiff. It may be that at the hearing it will constitute a good defence. But the judgments are wholly silent about it; and in the report published in the Colony there is no trace of the point having been made. Seeing how often points raised in the pleadings are dropped in Court for some sufficient reason, it is safer in an undefended appeal from an interlocutory order not to decide anything on this ground. Perhaps, indeed, there would still be no answer to a claim for interim protection. And their Lordships think it better to say nothing on this head except this: that for aught that appears in this record it is open to the defendant to insist on the point at the hearing.

They will humbly advise Her Majesty to dismiss the appeal.

Solicitors for appellant: *Young, Jones & Co.*

[PRIVY COUNCIL.]

NORTH SYDNEY INVESTMENT AND TRAMWAY COMPANY, LIMITED (*in liquidation*) . . . . . } PLAINTIFFS;

AND

HIGGINS AND OTHERS . . . . . DEFENDANTS.

J. C.*
1898
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Dec. 13, 14.
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Feb. 25.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Companies Act, 1874, *s.* 57—*Imperial Companies Act*, 1867, *s.* 25—*Effect of Company's Adoption of Contract made before its formation —Payment of Shares in Cash—Set-off.*

A company does not by its adoption of a contract of purchase made before its formation by persons purporting to act on its behalf incur any contractual relation with or obligation to the vendor.

In re Johannesburg Hotel Co., [1891] 1 Ch. 119, approved.

But where a company on completion of conveyances to it by the vendor gave credit to him for moneys placed in his hands as promoter on the terms of the company's prospectus by intending shareholders and specifically appropriated by them in payment pro tanto for their shares, registered the shares in their names, and at the same time obtained credit in respect of the payment from the vendor on account of the purchase-money:—

Held, that this was a payment in cash to the company in respect of those shares within the meaning of s. 57 of the New South Wales Companies Act, 1874, which is substantially identical with s. 25 of the Imperial Companies Act, 1867.

APPEAL from an order of the Supreme Court (Nov. 8, 1895) dismissing with costs a summons issued by the liquidator for a call of 66*l.* 13*s.* 4*d.* per 100*l.* share on the contributories of the company.

The question decided in this appeal was whether the amounts claimed which had been credited as paid on the shares held by the respondents had been paid in cash within the meaning of s. 57 of the Colonial Companies Act, 1874.

The facts, which were not in dispute, are stated in the judgment of their Lordships.

* *Present:* LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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The ground on which the summons was dismissed by the Court below was that the call represented moneys which had been already paid by the respondents in cash in respect of each of their shares at the time of the formation of the company.

Cozens-Hardy, Q.C., *Grosvenor Woods, Q.C.*, and *Christopher James*, for the appellants, contended that the Court below was wrong in holding that the company had made the contract of March 26, 1888, their own contract. Even if that contract were a real contract for sale and purchase, it was made before the incorporation of the company. It could not, therefore, be ratified by the company. Its adoption and confirmation by the directors on May 22 did not create any contractual relation between the company and the vendor or vendors of March 26, nor did it impose any liability on the company towards them. See *In re Johannesburg Hotel Co.* (1) and *Larocque* v. *Beauchemin*. (2) In fact, there was not at any time prior to September 29, 1888, the date of the conveyance to the company, any agreement by or liability of the company to purchase any land from or pay any purchase-money to Cliff or any other vendor thereof.

The Court below was also wrong in holding that the company's acceptance of Cliff's receipt in respect of payments by the shareholders amounted to an acknowledgment that money had been received by the company in cash. It was also wrong in holding that at the date of the formation of the company there was a present debt due to the company by him, and a present debt due by the company to him or any persons whom he represented, which could be set off one against the other so as to support a plea in law of payment.

Certificates for the shares in question were issued by the company on May 22, and were accepted by the respondents. There was, however, no entry in the company's books of any set-off between the company and any of the respondents, or even between the company and Cliff or any other vendor of any money due on any share against any money due from the

(1) [1891] 1 Ch. 119. (2) [1897] A. C. 358.

company. On that date there was no payment to the company in cash in respect of the shares. There was no liability to the vendor by the company in respect of purchase-money. The money paid by the shareholders to the vendor did not therefore discharge any debt of the company. It could not be set off against payment in respect of their shares or be treated as a payment in cash in respect thereof within the meaning of s. 57 of the Companies Act. There was no evidence or suggestion by the respondents that any of the shares were as to the two-thirds of their nominal value now in question paid for in any other manner than by the arrangements supposed to have been made at the board meeting of May 22, and the subsequent transactions supposed to carry out the same. No contract in respect of the shares was registered under s. 57 of the Companies Act.

A. T. Lawrence, Q.C., Compton-Smith, and *B. A. Hall,* for the respondents Grice, Smith, and Higgins, contended that the judgment of the Court below was right. Substantially there was at some time in the history of the transactions, either on May 22 or at the date of completion of the conveyances, a present liability of the company to Cliff, and a present liability of Cliff to the company, which could be set off one against the other. Cliff received the whole of the sum in question, a third of a million, from intending shareholders in the company to be formed. He was in fact and in law and always admitted himself to be, whatever the exact terms of his receipt, trustee for those intending shareholders to apply the moneys received from them in payment for shares. He was consequently indebted to the company at its formation or other later date in the amount so held in trust. He was the creditor of the company in the same amount at least when the conveyances were executed, if not earlier. It was contended that the payment by the shareholders under such circumstances to Cliff was a payment in cash to the company at the date of the adoption by the board of the contract on May 22, 1888. Reference was made to *Ferrao's Case* (1); *Howard* v. *Patent Ivory Manufacturing Co.* (2) But whatever the date, the fact remains that

(1) (1874) L. R. 9 Ch. 355. (2) (1888) 38 Ch. D. 156.

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the money was in Cliff's hands appropriated to the payment up of the respondents' shares, that the company got the benefit of such moneys, being credited therewith in part payment of price due to Cliff, and in consideration thereof obtained a conveyance of the lands. It was contended that this was actual payment in cash to the company by the respondents in respect of their shares within the meaning of s. 57. Also, that both the company and the liquidator were estopped from denying such payments.

Swinfen Eady, Q.C., and *Kirby*, for the respondents Alcock and Hogan, contended to the same effect, and cited *Jones* v. *Victoria Graving Dock Co.* (1)

Cozens-Hardy Q.C., replied.

1899
Feb. 25.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal by the official liquidator of the North Sydney Investment and Tramway Company, Limited (now in liquidation), from an order of the Supreme Court of New South Wales in Equity made on November 8, 1895, dismissing an application by the liquidator by way of summons that a call of 66*l.* 13*s.* 4*d.* be made on the contributories of the company. The real question involved is whether certain shares in the company held by and registered in the names of the respondents respectively had or had not been paid for in cash within the meaning of s. 57 of the Companies Act of the Colony, which is substantially in the same terms as s. 25 of the Imperial Companies Act, 1867.

The facts on which the answer to this question depends are somewhat complicated, but are not in dispute.

By contracts made in March and April, 1888, one Charles Arthur Moresby Billyard contracted for the purchase of a tract of land in North Sydney. The aggregate purchase-money was 134,000*l.*, and of this amount it was agreed that 35,000*l.* should be satisfied by partly paid-up shares of a company to be formed to work and acquire the property. Billyard's object was to sell the property to such a company at an enhanced price, and

(1) (1877) 2 Q. B. D. 314.

his ideas as to the profit obtainable seem to have grown from time to time as matters proceeded.

Shortly afterwards a prospectus was issued of a syndicate which has been called in the argument Syndicate No. 1. It is entitled "Syndicate prospectus of the North Sydney Investment Company, Limited. Capital 300,000*l.* in sixty shares of 5000*l.* each payable one-third in cash one-third months" (the words "in three" are accidentally omitted) "interest six per cent. added. The balance is not likely to be required. Two and a half per cent. upon the subscribed capital will be charged to cover all preliminary expenses in connection with the syndicate. Provisional directors, C. A. M. Billyard, J. W. Cliff, Alick Osborne." The prospectus then states that the syndicate is formed for the purpose of acquiring the lands described, being those comprised in Billyard's contracts, and after stating the character and advantages of the property and other details not material for the present purpose, concludes thus:—"The terms of purchase are as follows: Total purchase-money 300,000*l.* payable one-third in cash one-third by promissory note at three months with six per cent. added balance can remain for three years at the lowest bank rate of interest if required and the owner will join in the conveyance of any portion sold. Immediately the full number of shares has been subscribed it is proposed to place the property in the English market, and it is thought that with the names associated and the soundness of the undertaking there will be no difficulty whatever in disposing of the property at a sum decidedly not less than half a million."

This syndicate was not registered as a joint stock company with limited liability. The whole of the shares were subscribed by various persons including Higgins and Hogan, two of the respondents, who paid in cash one-third of the amount of three shares and gave promissory notes for another third with 6 per cent. interest added. The receipt given to the respondent Higgins is headed "North Sydney Investment Company, Limited," and the sum of "1666*l.* 13*s.* 4*d.* is thereby stated to have been paid as a deposit on one share in the above company," i.e., in the company to be registered with limited

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liability. The promoter determined to change the name of the intended company and to increase the nominal capital and the amount of the purchase-money. Accordingly he shortly afterwards issued another prospectus of what has been called Syndicate No. 2. This document is in the following terms: "Syndicate prospectus of the North Sydney Investment and Tramway Company, Limited, to be registered under the Companies Statute, 1871. Capital 500,000*l.* in 100 shares of 5000*l.* each, one-third payable in cash, one-third in three months, interest six per cent. added, the balance is not likely to be required. Two and a half per cent. upon the subscribed capital will be charged to cover all preliminary expenses in connection with the syndicate." The names of the provisional directors and description and particulars of the property and the terms of purchase (substituting 500,000*l.* for 300,000*l.*) are then set forth as in the former prospectus. It then states: "The contract with the vendors and the memorandum and articles of association may be inspected at the office of the solicitor to the company." Attached to the second prospectus was a form of receipt. The form filled up and given to the respondent Alcock was as follows:—

"Received the sum of ten thousand pounds being first and second payments (latter with interest deducted) for three shares in within syndicate as per prospectus. This receipt to be returned upon receipt of share certificate in limited company from Jas. Service and Company (signed) J. Woolf, solicitor for the Melbourne portion of the syndicate and (by his request) for the vendor."

No doubt the arrangements for obtaining the share capital of the company were not made so carefully or skilfully with a view to the exigencies of the law as they might have been. But on a careful consideration of the language of these documents, their Lordships come to the conclusion that both prospectuses were and were intended to be an invitation to subscribe for shares in a joint stock company then about to be registered with limited liability, the memorandum and articles of association of which were offered for inspection in the second prospectus with a view to the purchase by that company of the

property in question, and that consequently the money paid by the subscribers on the terms of the prospectuses was intended to be applied in payment up of shares in the company when formed, and further that the promoter who issued the prospectuses and received the money of the subscribers was bound so to apply the amounts paid by them and to procure share certificates to be issued to the several subscribers in exchange for the receipts held by them. The subscribers on the first prospectus might have raised and (as will presently appear) did raise questions as to their position under the second prospectus, but (as will also appear) they accepted the position of shareholders in the company, and for valuable consideration waived any such questions.

A contract purporting to bear date March 26, 1888, was made between one John William Cliff, described as the vendor, and certain persons described as "trustees for the company hereinafter mentioned," whereby, after reciting that a company with limited liability was about to be formed having for its objects, amongst other things, the purchase of the lands in the schedule (being those purchased by Billyard) under the name of the "North Sydney Investment and Tramway Company, Limited," it was agreed that the vendor should sell, and the company should purchase, the lands in question for 512,500*l.* to be paid as follows—namely, 171,000*l.* in cash on the signing of the agreement, a further sum of 171,000*l.* at three months from the date of this agreement, with interest at 6 per cent per annum, and the remaining sum of 170,500*l.* to remain on security of the property with interest at the same rate. Cliff (who was named as one of the provisional directors in both prospectuses) was admittedly the nominee and agent of Billyard, the vendor and promoter. The addition of 12,500*l.* to the purchase-money obviously represents the $2\frac{1}{2}$ per cent. charged for the expenses of the syndicate. Mr. Cozens-Hardy contended that the contract was not executed until after the date which it purports to bear. This may very likely be so, but in the view which their Lordships take the point is immaterial.

On May 5, 1888, the North Sydney Investment and Tramway Company, Limited, was registered with the object

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(amongst other things) of adopting and carrying into effect the contract dated March 26, 1888, and with a capital of 1,000,000*l.* divided into 200 shares of 5000*l.* each.

The first meeting of the directors of the company was held on May 22, 1888. The secretary placed before the meeting a document signed by Cliff which is of the greatest importance. This document is in the following terms:—

"North Sydney Investment and Tramway Company, Limited. I John William Cliff, the vendor in contract dated the 26th day of March, 1888, hereby acknowledge to have received from each of the following shareholders in this company the respective sums of ( ), amounting in all to 333,333*l.* 6*s.* 8*d.*" Then follows a schedule of the subscribers to the syndicate (including the present respondents) in alphabetical order, with denoting numbers against their several names of their shares, amounting in all to 100 shares, and shewing the number of shares subscribed for by each of them.

The minutes of the directors' meeting record that "The secretary reported the present position of the company and exhibited the vendors' receipt to the shareholders for the sum of 3333*l.* 6*s.* 8*d.* per share, making in all a payment of 333,333*l.* 6*s.* 8*d.*, which was accepted by the board and initialled by the chairman." The contract of March 26, 1888, was then "adopted and confirmed." Two directors and the secretary were directed to sign "the share certificates," and an appointment was made for their so doing on the following day, also for the affixing of the company's seal thereto. And the secretary was directed before issuing the share certificates to obtain from each shareholder his syndicate receipt, and also to obtain his signature to the articles of association. But no allotment was made by the directors in express terms of any shares in the company.

The secretary proceeded to act on these resolutions. All the respondents received in exchange for their syndicate receipts certificates of the corresponding shares in the company, which were certified as paid up to the amount of 3333*l.* 6*s.* 8*d.* per share. And the names of the respondents were severally entered in the register as holders of their shares (described as

allotted on May 22) with that amount paid. The acceptance by the respondents of the shares removes any difficulty as to Cliff's authority to apply for shares in their names or in consequence of the increase of the nominal capital to 1,000,000*l.*, or as to the directors' authority to allot them. Their Lordships are disposed to think that Cliff had an implied authority to apply for shares in the names of the subscribers, but it is not necessary to decide the point.

In October, 1888, each of the shares of 5000*l.* was subdivided into fifty shares of 100*l.* each, with 66*l.* 13*s.* 4*d.* per share paid thereon. Calls to the amount of 16*l.* and 17*l.* 6*s.* 8*d.* have been paid before and since the liquidation, and the demand of the liquidator is therefore for the sum originally credited on the shares which he contends has not been paid in cash as required by the statute.

The learned judge in the Court below has on these facts decided in favour of the respondents, holding, first, that by the directors adopting and confirming the contract of March 26 the company made it their own contract; secondly, that the acceptance by the company of Cliff's receipt amounted to an acknowledgment that the money had been paid to the company in cash; thirdly, that there was on May 22 a present debt due to the company and also a present debt due by the company which could be set off one against the other in such a way as to support a plea of payment in law. For the reasons presently stated their Lordships do not differ from the conclusion of the learned judge, although they cannot assent to the grounds of his judgment. Their Lordships do not think that the adoption and confirmation by directors of a contract made before the formation of the company by persons purporting to act on behalf of the company creates any contractual relation whatever between the company and the other party to the contract, or imposes any obligation whatever on the company towards that party. They think that the proposition maintained by the learned judge is opposed both to principle and authority, and that the judgment in the case of *In re Johannesburg Hotel Co.* (1) referred to by the learned judge is to the contrary

(1) [1891] 1 Ch. 119.

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effect. Nor can their Lordships hold that the acceptance by the directors of Cliff's receipt was an acknowledgment of payment in cash, and, even if it were, the question under the statute is whether cash has been paid, not whether a receipt has been given or payment has been acknowledged.

The inaccuracy of Cliff's document and the irregularity of the directors' proceedings are patent. Cliff had not received the money of the subscribers as vendor to the company, but he or his principal Billyard (the promoter) had received it on the terms of the prospectus—i.e. (as their Lordships have already said), for the purpose of the subscribers becoming shareholders of a company which should acquire the property and obtaining for the shareholders share certificates in exchange for their syndicate receipts. Nor could Cliff retain the subscribers' money in part payment of the purchase-money payable by the company (if they should purchase) because it was not the company's money, and would not become so until the shares were allotted and the money paid or properly credited to the company in payment up of the shares. Looking at the facts by the light of the previous documents and dealings and the relation of the parties to each other, their Lordships think that Cliff's document was in substance and effect an application for and on behalf of the persons named in the schedule for shares, and that the directors acted upon and accepted that application by putting the names of those persons on the register and giving them notice that they had done so, which superseded the necessity for any formal allotment. Their Lordships also think that Cliff's document was an acknowledgment that he had received 333,333*l.* 6*s.* 8*d.* from the subscribers appropriated to the payment up of their shares in the company; but he was wrong in stating that he had received that sum as vendor, or in claiming to retain it as part of his purchase-money as against the company, who had not at that time entered into any contract with him or his principal, Billyard. Their Lordships do not think that in these circumstances Cliff's acknowledgment of having received the 333,333*l.* 6*s.* 8*d.* amounted to payment in cash to the company, and consequently the directors were wrong in crediting the shareholders with the payment of that

amount on their shares as on May 22. But their doing so was evidence of the amount to be paid on the shares on allotment.

However, on September 29, 1888, the property was conveyed to the company by four documents of that date. The purchase-money of 512,500*l.* was paid and discharged by the appropriation and retainer of 333,333*l.* 6*s.* 8*d.* in Cliff's hands, and two mortgages dated October 1, 1888, and October 22, 1888, made by the company to Billyard and Cliff for 149,166*l.* 13*s.* 4*d.* and 30,000*l.*, making together 179,166*l.* 13*s.* 4*d.* The two sums of 333,333*l.* 6*s.* 8*d.* and 179,166*l.* 13*s.* 4*d.* make together 512,500*l.* In other words, the company gave credit to Cliff and his principal, Billyard, for the 333,333*l.* 6*s.* 8*d.* in Cliff's or Billyard's hands specifically appropriated to the payment up of the subscribers' shares in the company, and got credit for that amount of the purchase-money. Their Lordships think that this transaction was a payment in cash on the subscribers' shares on that date which would satisfy the statute in accordance with the decisions of the English Courts in *Spargo's Case* (1) and *Ferrao's Case* (2), and the decision of this Board in *Larocque* v. *Beauchemin.* (3) There was a sum payable by Cliff to the company for the specific purpose of paying up the shares, and there was a like sum payable to the vendor for purchase-money, and it was not necessary that the parties should go through the form of handing the money over and receiving it back or giving cross cheques. It is sufficient if the shareholders can shew that their shares are paid up to the extent of the money in Cliff's hands, although the payment was not made at the time or in the manner erroneously imputed by the directors.

One other point which was made by counsel should be mentioned. It appears that in the year 1889 certain of the subscribers on the terms of the prospectus of Syndidate No. 1, including the respondents Higgins and Hogan, claimed to participate in the enhanced price obtained by Billyard above 300,000*l.* This claim was compromised by the payment of a sum of money and the transfer of certain shares in the company by

(1) L. R. 8 Ch. 407. (2) L. R. 9 Ch. 355.
(3) [1897] A. C. 358.

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Billyard to the objecting shareholders. A release was executed in which the members of the syndicate in some respects treated themselves as vendors to the company. Mr. Cozens-Hardy argued that this document was evidence of the true position of the parties, and that they were precluded by it from saying that the moneys paid by them were paid as a deposit on the shares in the company to be registered. The release, however, was certainly not an estoppel as between the respondents parties to it, and the liquidator and their Lordships do not think that they are precluded by the form of the release from shewing the terms upon which they really paid their money as appearing from the receipts given and the other documents. The compromise was subsequent to the completion of the purchase and the payment up of the shares, and was in truth res inter alios acta.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of it; but there will be only one set of costs between all the respondents.

Solicitors for appellants: *Kimbers & Boatman.*

Solicitor for respondents Higgins, Grice and Smith: *H. A. Graham.*

Solicitors for respondents Alcock and Hogan: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } DEFENDANTS;

AND

WASHINGTON . . . . . PLAINTIFF.

J. C.*
1898
July 26.
1899
Feb. 24.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada Railway Act (51 *Vict. c.* 29), *s.* 262, *sub-ss.* 3, 4—*Construction*—*Railway Committee of Privy Council.*

Held, that under the true construction of the Railway Act (Canada), 51 Vict. c. 29, the power conferred by sub-s. 4 of s. 262 upon the Railway Committee of the Privy Council to exonerate a railway company during a specified portion of the year from the duty of filling certain spaces specified in sub-s. 4, did not apply to the duty imposed by sub-s. 3 of filling certain other spaces specified by sub-s. 3. Such extension of power was not authorized by the grammatical construction of the sub-sections, nor rendered imperative by the context.

APPEAL by special leave from a decree of the Supreme Court (Dec. 9, 1897) reversing a decree of the Court of Appeal for Ontario (March 2, 1897), and restoring a judgment of the High Court of Ontario.

The question decided was as to the true construction of Dominion Railway Act (51 Vict. c. 29), s. 262, sub-ss. 3, 4 (set out in their Lordships' judgment), which imposed upon the appellant company the duty of filling or packing frogs and other spaces.

The High Court gave judgment in accordance with the verdict of the jury for $2500 damages to the respondent, based on a finding that the appellants were guilty of negligence in not having properly blocked or properly protected the frog, in which the respondent's foot had on January 15, 1896, been caught.

The Court of Appeal set aside this verdict and judgment on

* *Present:* LORD MACNAGHTEN, LORD MORRIS, and SIR HENRY STRONG.

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the ground that the Railway Committee of the Privy Council had ordered, under statutory authority, that the appellants should be at liberty to leave out the packing or filling of frogs and other spaces from December to April in each year.

The Supreme Court reversed the decree of the Court of Appeal on the ground that the Railway Committee had no power to make the order. Its authority was limited to the spaces enumerated in sub-s. 4. It had no authority to allow filling to be left out of frogs. The requirements of sub-s. 3 must be observed throughout the year, and no power was conferred to exonerate the appellants therefrom.

Loehnis and *Osler*, for the appellants, contended that they were justified by the order of the Railway Committee in leaving the frog in question unpacked; and that the construction of s. 262 adopted by the Court of Appeal was right. Acts of Parliament are divided into sections and sub-sections merely for convenience, and such division ought not to control their grammatical construction or furnish any rule of interpretation. A proviso of this kind should be construed in reference to the preceding part of the whole section to which it is appended, and to the whole subject-matter of the legislation to which it refers, unless some absurdity or inconvenience would result. Here it would be unreasonable, having regard to mechanical and engineering reasons and consideration of convenience, to limit the application of the proviso simply to sub-s. 4. The obvious reason for giving the power to the Railway Committee has regard to a serious difficulty of working the railway with such fillings in the winter months, and to the packed snow and ice which take the place of such fillings. It was to provide against the danger of derailing trains by the snow and ice forming on the packing, and thereby raising the wheel and thereby perilling the safety of the train, a danger which existed equally in the case of spaces between the fixed rails of the switch referred to in sub-s. 3, and of spaces mentioned in sub-s. 4. With regard to the effect to be given to the words "such filling," and to the extent to which one section may be incorporated by another, reference was made to *Rex* v.

Inhabitants of Newark-upon-Trent (1); *Cohen* v. *South Eastern Railway* (2); *Eastern Counties Railway* v. *Marriage*. (3)

Lynch-Staunton and *Maclaren*, for the respondent, were not heard.

1899. Feb. 24. The judgment of their Lordships was delivered by

SIR HENRY STRONG. This is an appeal from the Supreme Court of Canada reversing a judgment of the Court of Appeal of the Province of Ontario.

The action was brought by the respondent against the appellants to recover damages for injuries suffered by him resulting in the loss of his arm in January, 1896, while in the discharge of his duties as a yardman in the appellants' employ at Hamilton in Ontario.

At the trial of the action before Street J., the jury found that the injuries to the respondent were caused by his foot having caught in a "frog" in the appellants' yard, and that the appellants had been guilty of negligence in not having this frog "blocked" or properly protected. Judgment was thereupon entered for the respondent for $2500, the amount at which the jury assessed the damages. This judgment having been reversed by the Court of Appeal was restored by the judgment of the Supreme Court.

The appellants are a railway company subject to the legislative authority of the Parliament of Canada, and the only question raised before the Supreme Court, and argued on the present appeal, relates to the proper legal construction of an Act of Parliament imposing certain duties on railway companies.

The enactment in question is contained in s. 262 of the Railway Act (Canada) 51 Vict. c. 29, which is in the following words:—

"Section 262.

"(1.) This section shall apply to every railway and railway company within the legislative authority or jurisdiction of the Parliament of Canada:

(1) (1824) 3 B. & C. 59, 71. (2) (1877) 2 Ex. D. 253.
(3) (1860) 9 H. L. C. 32.

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"(2.) In this section the expression 'packing' means a packing of wood or metal or some other equally substantial and solid material, of not less than two inches in thickness, and which, where by this section any space is required to be filled in, shall extend to within one-and-a-half inches of the crown of the rails in use on any such railway, shall be neatly fitted so as to come against the web of such rails and shall be well and solidly fastened to the ties on which such rails are laid:

"(3.) The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches in width, *shall be filled with packing* up to the under side of the head of the rail:

"(4.) The spaces between any wing rail and any railway frog, and between any guard rail and the track rail alongside of it, shall be filled with packing at their splayed ends, so that the whole splay *shall be so filled* where the width of the space between the rails is less than five inches; such packing not to reach higher than to the underside of the head of the rail: provided however, that the Railway Committee may allow *such filling to be left out from the month of December to the month of April in each year both months included:*

"(5.) The oil cups or other appliances used for oiling the valves of every locomotive in use upon any railway shall be such that no employee shall be required to go outside the cab of the locomotive, while the same is in motion, for the purpose of oiling such valves."

The Railway Committee of the Privy Council of Canada on November 19, 1889, in pursuance of the authority conferred upon them by the 4th sub-section of s. 262, made the following order:—

"In the matter of the application of the Grand Trunk Railway Company for permission to leave out packing on their lines in spaces behind or in front of frogs or crossings and between fixed rails of switches and wing rails and frogs and guards and track rails at splayed ends where spaces are less than five inches wide, from the 1st of December to the 30th of April of each year until further orders, under the provisions of section 262 of the Railway Act, the committee authorizes the

packing to be left out as above on the Grand Trunk and affiliated roads and approves of draft notice to the company to this effect submitted, as per letter sent No. 3047."

The jury found in answer to certain specific questions left to them by the judge that the accident was caused by the respondent's foot having caught in a frog, and that the appellants in not having the frog "blocked" or properly protected were guilty of negligence which led to the accident.

The appellants' contention in the Courts below and at their Lordships' bar, was that they were exonerated from any duty to cause the frog in question to be filled or packed in the interval between December 1 and April 1 by the order of the Railway Committee before stated dispensing with such filling. The validity of this objection which prevailed in the Court of Appeal must, it is manifest, depend altogether on the statutory authority of the committee to make the order in question.

The respondent insists that the provision contained in sub-s. 4 conferring upon the committee power to dispense with filling has reference only to the filling specifically mentioned in the same sub-s. 4, and does not apply to the case of "the spaces behind and in front of every railway frog or crossing" mentioned in sub-s. 3; and this was held by the Supreme Court to be the proper construction of the clause in question.

Their Lordships are unable to see that there is any error in the judgment of the Supreme Court in so construing the Act as to restrict the powers of the Railway Committee to the filling required by the 4th sub-section. The words "such filling" in the proviso in their primary signification must mean the filling required by the immediately preceding part of the 4th sub-section, and do not include that made obligatory by the 3rd sub-section. And this the ordinary grammatical construction ought to prevail unless it can be shewn that there is to be found in the statute some context or provision making it imperative to enlarge the scope of the proviso so as to include the cases dealt with in sub-s. 3. Their Lordships are unable to find any such context, and are consequently of opinion that the judgment of the Supreme Court is right. If it had been

J. C. 1899 GRAND TRUNK RAILWAY COMPANY OF CANADA v. WASHINGTON.

intended to include in the proviso to sub-s. 4 the cases provided for by sub-s. 3, it would have been obvious that the plural word "fillings" should have been used; therefore, though not of course by itself conclusive, it is not immaterial to observe that the word "filling" in sub-s. 4 being in the singular number supports the construction adopted by the Supreme Court.

The decision of the Court of Appeal seems to have been influenced by contrasting the Act of Parliament with certain statutes enacted by the Legislature of Ontario for the regulation of provincial railways. As these are enactments emanating from a different legislative body from that which passed the statute to be interpreted and cannot be said to be in pari materia with it, their Lordships are unable to see that they ought to have any influence upon the question to be decided arising exclusively upon the Dominion Act and relating only to Dominion railways.

Their Lordships will humbly advise Her Majesty to dismiss this appeal and to affirm the judgment of the Supreme Court.

The appellants must pay the respondent's costs.

Solicitors for appellants: *Harrison & Powell.*
Solicitor for respondent: *Freeman Roper.*

[PRIVY COUNCIL.]

GADEN . . . . . PLAINTIFF; J. C.*

AND 1898

THE NEWFOUNDLAND SAVINGS BANK DEFENDANTS. *July* 14, 15,

1899

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND. *Feb.* 24.

Banker and Customer—Effect of Drawee Bank certifying Cheque—Usage—Effect of crediting Customer with Amount of Cheque deposited.

Unless a specific usage is proved, the only effect of a drawee bank initialling a cheque drawn upon it is to certify that it has funds of the drawer in its hands sufficient to meet its payment:—

Held, that the respondent bank, by accepting a deposit of a certified cheque and crediting the depositor with the amount thereof in her account, must be deemed to have accepted it for the purpose of cashing it as the depositor's agent, and could not, in the absence of express agreement to that effect, be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank.

APPEAL from a decree of the Supreme Court (Aug. 9, 1897) affirming a decree of Winter J. (July 26, 1896) in favour of the respondents.

The facts were stated in a joint case filed by the parties and are set out in their Lordships' judgment. The two which were most material, and on which the dispute turned, were that the drawee, that is the Commercial Bank, had initialled the appellant's cheque, and the respondent bank had, on her deposit of the same, credited her in account with the amount thereof. The drawee bank failed before the cheque was cashed, and the appellant claimed a right to recover the amount from the respondent bank, as the legal effect of the deposit and credit entry, no case of negligence being alleged or proved as regards the presentation of the cheque by the respondent for payment.

It was contended in the Supreme Court, on behalf of the appellant, that the transfer by the appellant of the cheque certified as stated to the respondent bank, did, in pursuance of

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR HENRY STRONG.

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universal custom, operate as the payment in cash of the amount for which the said cheque was drawn; that the respondent bank thereupon became holders for value of the said cheque, and accepted the drawee bank as their debtors for the amount of the same; that in truth and fact the respondent bank had accepted and treated the said cheque as equivalent to the said amount in cash by crediting the appellant for the same in her bank book, and had in fact looked to the drawee bank for payment of the same; and that the respondent bank ought not now to be heard to say that they accepted the said cheque only upon the condition of its being honoured by the said Commercial Bank or conditionally at all.

It was further contended that, even if the said cheque was presented by the respondent bank in due course to the said Commercial Bank, no due or proper notice of dishonour was given to the appellant by the respondent bank.

A. T. Lawrence, Q.C., and *Mackarness*, for the appellant, repeated the contentions which had been addressed to the Supreme Court. The certificate of the bank that the cheque was good was equivalent to acceptance. It meant that the drawee had funds of the drawer in his hands to the amount of the cheque, and had set them apart to satisfy it when presented. The drawee bank had also debited the drawer with the amount of the cheque. The drawee had, as the legal effect of the certification, become the principal debtor. The transfer of the cheque certificated by the Commercial Bank, on which it was drawn, by the appellant to the respondents, operated as a transfer of the cash so set apart for the purpose of meeting the cheque. The transfer was so accepted and treated by the respondents. They were estopped from contending to the contrary. They were holders for value of the cheque, which had become their property, and if the Commercial Bank failed to honour it, the loss was the loss of the respondent bank, which had bought the cheque and credited the appellant with the amount. In support of these contentions, *Merchants' Bank* v. *State Bank* (1) and *Boyd* v. *Nasmith* (2) were relied upon:

(1) (1870) 10 Wallace, U. S. Rep. 604, 647. (2) (1889) 17 Ont. Rep. 40.

see, further, Morse on Banking, (1870) pp. 281, 282; *Ex parte Richdale* (1); *Royal Bank of Scotland* v. *Tottenham.* (2) Notice of dishonour ought to have been immediately given by the respondents to the appellant: *Carew* v. *Duckworth* (3); Newfoundland Bills of Exchange Act, c. 93 of Cons. Stat. ss. 47–50, 72, 73.

Sir James Winter, Q.C., and *R. Newton Crane*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

SIR HENRY STRONG. This is an appeal from the Supreme Court of Newfoundland in an action instituted by the appellant against the respondent.

For the purpose of this appeal the facts are stated in a joint case and in the admissions of the parties.

On December 8, 1894, the appellant, having to her credit in the Commercial Bank at St. John's the sum of $3,850.07, went about 11 o'clock on the morning of that day to the bank and there drew a cheque payable to herself or bearer for the full amount of her balance, and presented it to the ledger-keeper, who, by direction of the manager, certified it in the usual manner by writing his initials across it, and delivered it thus initialled to the appellant. At the same time the cheque was charged to the appellant's account in the books of the bank, and an entry was also made in her pass-book balancing the account. This cheque the appellant immediately took to the office of the respondents, the Savings Bank, and there, without indorsing it, deposited it; and an entry was thereupon made by the respondents' officer in the appellant's Savings Bank pass-book in these words: "1894, December 8th, deposit $3,850.07."

On the same day, Saturday, December 8, the Savings Bank deposited the cheque with the Union Bank at St. John's. On the following Monday, December 10, the Union Bank presented the cheque to the Commercial Bank for payment, when it was dishonoured. The Commercial Bank suspended payment on

(1) (1881) 19 Ch. D. 409. (2) [1894] 2 Q. B. 715.
(3) (1869) L. R. 4 Ex. 313.

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the morning of that day, December 10, and has never since resumed payment, but has been declared insolvent under an Act of the Colonial Legislature providing for its winding-up. The cheque was returned by the Union Bank to the Savings Bank. No notice of dishonour was sent to the appellant until December 14. It is admitted that if the cheque had been presented to the Commercial Bank on the day on which it was drawn, Saturday, December 8, it would have been paid.

The appellant demanded payment of the amount of the cheque from the respondent, which having been refused, she brought her action for its recovery.

The allegation of the appellant in her petition is that she had deposited money to the amount in question with the respondent, and that the latter had given her credit therefor in the bank-book issued to her by the Savings Bank. No case asking relief on the ground of negligence or breach of duty, or any other ground than that of money had and received, was made by the appellant.

To this petition the respondent pleaded that the amount sued for consisted of a cheque drawn by the appellant in favour of herself upon the Commercial Bank; that the cheque was duly presented and dishonoured, and that the appellant had notice of presentment and dishonour. The appellant by her reply denied due notice of dishonour, and further alleged that the cheque was certified and initialled, and transferred to the respondent the money of the appellant then lying in the Commercial Bank; that the cheque was paid to and accepted by the Savings Bank, and the appellant credited with the amount thereof; and the appellant denied that the Commercial Bank became and was declared insolvent before the time had elapsed within which the respondent could have presented the cheque, and suggested that the respondent was guilty of laches in not presenting it earlier. Upon these pleadings the cause came on to be heard before Winter J. without a jury, who, after hearing the deposition of the appellant and that of the ledger-keeper of the Commercial Bank, as well as that of a witness called to prove the custom of bankers at St. John's as to the initialling of cheques, gave judgment for the respondent. The cause was

subsequently reheard before the Full Court, which affirmed the judgment of Winter J.

The law of Newfoundland relating to cheques is contained in c. 93 of the Consolidated Statutes. By s. 72 of that Act it is enacted that:—

"A cheque is a bill of exchange drawn on a banker payable on demand, and except as otherwise provided the provisions of this chapter applicable to a bill of exchange payable on demand apply to a cheque."

By s. 73 of the same Act it is enacted that:—

"(1.) Where a cheque is not presented for payment within a reasonable time of its issue and the drawer or person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such a cheque been paid;

"(2.) In determining what is a reasonable time regard should be had to the nature of the instrument, the usage of trade and of bankers and the facts of the particular case."

Permission was given to the appellant to amend her pleadings, if she thought fit to do so, in order to make a case of negligence or breach of duty on the part of the respondent, but she declined to avail herself of such permission.

Their Lordships are of opinion that the Courts below were right in holding that the presentment of the cheque for payment was in reasonable time.

It was contended on behalf of the appellant that the initialling of the cheque had the effect of making it current as cash. It does not, however, appear to their Lordships, in the absence of evidence of such a usage, that any such effect can be attributed to this mode of indicating the acceptance of a cheque by the bank on which it is drawn. A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by shewing on

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the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn.

The entry in the pass-book has been much relied on as shewing that the respondents accepted the cheque as cash; but such entries are not conclusive: they are admissions only, and, as in the case of receipts for the payment of money, they do not debar the party sought to be bound by them from shewing the real nature of the transactions which they are intended to record.

The question for decision is therefore reduced to this: Did the respondent acquire title to this cheque by discounting or purchasing it, or was it received merely on deposit for the purpose of collection with the further understanding that the amount when paid should be considered as a fund deposited by the appellant with the respondent on which the latter was to pay interest? In the absence of evidence of any express agreement between the appellant and the officer of the Savings Bank at the time of the deposit, the intention of the parties can only be implied from the circumstances in proof, including the fact that the cheque was certified. Is it to be inferred from this alone that the respondent, which was not a bank of discount but whose duty and business it was merely to receive money on deposit, so far departed from its duty as well as from its general course of business, which must be presumed to have been in accordance with its duty, as to have accepted this cheque, not by way of deposit and for the purpose of obtaining the cash for it in the usual way, as the agents of the appellant, but with the intention of acquiring title to it, and thus in effect gratuitously guaranteeing its payment? Their Lordships are of opinion that there can be only one answer to this question—that which has been given by the Courts below. If there was any such agreement as the appellant sets up, it lay upon her to furnish proof of it, but in this she has wholly failed.

As regards authority, no decided case proceeding upon a state of facts precisely similar to the present has been cited, and their Lordships have not been able to discover any such authority in the reports of the English Courts. Upon a different

state of facts, raising substantially the same question as that involved in this appeal, there is however ample authority. Had the respondent instead of the drawee bank become insolvent before presentment, and had the cheque been found by its assignees or liquidators in specie amongst the assets, and had it been claimed by them as against the appellant to belong to the estate of the Savings Bank, the question involving the title to the cheque would have been precisely the same as that now presented for decision. In such a case numerous authorities are to be found which apply to the case under appeal. In *Giles* v. *Perkins* (1), a case arising between the customers of bankers who had become bankrupt and the assignees of the latter, it was held that bills which had been deposited by the customers and credited and treated as cash by the bankers, the depositors being authorized to draw against them, had not become the property of the bankers. The assignees having found such bills in specie in the hands of the bankrupts, and having received payment of them, were held bound to account for the proceeds to the customers whose title to the bills it was held had never been divested. And this case was affirmed and followed in the later case of *Thompson* v. *Giles* (2), under circumstances even stronger to shew a change of title, inasmuch as in the last case the customers had indorsed the bills. If, therefore, the case had been the converse of that before their Lordships, and the appellant had been claiming title to the cheque instead of seeking to repudiate it, the authorities above cited, which could be largely added to, would be decisive to shew that the cheque had never ceased to be the property of the appellant, and no reason can be suggested why the same conclusion should not be reached in the present case.

Their Lordships will humbly advise Her Majesty to dismiss the appeal and affirm the judgment appealed against.

The appellant must pay the respondent's costs.

Solicitors for appellant: *Gamlen & Burdett.*

Solicitor for respondents: *Dennis H. Herbert.*

(1) (1807) 9 East, 12.

(2) (1824) 2 B. & C. 422.

[PRIVY COUNCIL.]

J. C.* 1898 June 21, 22. 1899 Feb. 24.

LE SÉMINAIRE DE QUÉBEC . . . . DEFENDANT;

AND

LA CORPORATION DE LIMOILOU . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Municipal Code of Quebec, Art. 712, *sub-s.* 3—*Construction—Property of a Corporation—Liability to Taxation.*

By the true construction of art. 712, sub-s. 3, of the Municipal Code of Quebec, property belonging to a corporation "for the ends for which they are established, and not possessed solely by them to derive a revenue therefrom," is not taxable:—

But *held*, that a farm belonging to the appellant corporation and worked by them as a farm in order to derive revenue therefrom, is taxable, although not detached from the residue of the corporate property and occasionally used for the above ends.

APPEAL from a decree of the Court of Queen's Bench (Oct. 5, 1897) reversing a decree of the Superior Court (May 6, 1897) which had dismissed the respondent's action.

The facts are stated in the judgment of their Lordships.

The question decided was whether the respondent was authorized by the true construction of art. 712 of the Municipal Code in assessing as taxable property those lots of Maizerets which are cultivated and kept for farming purposes.

The respondent claimed that the farm in question was only as to a very small portion possessed for the ends for which the appellant corporation was established, and that it was principally held as an ordinary farm from which the appellant derived a revenue, and that taxation was only sought to be imposed on the part under cultivation.

The appellant claimed under sub-s. 3 of art. 712 that the whole was exempt from taxation, not being held solely for purposes of deriving an income.

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR HENRY STRONG.

Th. Chase Casgrain, Q.C., and *Hume Williams*, for the appellant, contended that the estate in question was shewn to have been held by it as a dependency of its educational establishment in the neighbouring city, and that it had long been used as a resort for recreation, rest, sport, and athletic exercises for the benefit of its scholars, teachers, and teachers in training. The fact that a part of the land was tilled, sown, and harvested by a tenant farmer did not alter its primitive and predominant destination. It was held for other purposes besides that of deriving revenue therefrom. Besides, it was in its entirety exempt from taxation, and the respondent was not entitled arbitrarily to divide it into two parts, and claim that part was taxable and only a portion of it exempt.

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Belleau, Q.C., and *Muir Mackenzie*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

1899 Feb. 24.

SIR HENRY STRONG. This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec in an action brought by the respondents to recover $161.82, the amount of municipal taxes assessed upon part of a property belonging to the appellants known as the "Farm of Maizerets," situate in the municipality of Limoilou. The appellants set up as a defence that the property in question is exempted from taxation under the provisions of the Municipal Code of the Province of Quebec.

The cause was originally heard in the Superior Court before Andrews J. who dismissed the action.

On appeal to the Court of Queen's Bench this judgment was reversed, and a judgment was pronounced in favour of the respondent for the amount claimed and interest.

From this latter judgment the present appeal to Her Majesty has been taken.

The appellants are a corporation according to the laws of the Province of Quebec, established in the city of Quebec, and having for its object the education of youth.

The respondents are a municipal corporation within whose territorial limits the property in respect of which the taxes in

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dispute are claimed is situated. This property of Maizerets, which originally comprised only a part of the farm now known by that name, was acquired by the seminary in the year 1717, and was for many years used exclusively for farming purposes. The appellants subsequently and at different times acquired other parcels of land adjoining this farm, which together with the original farm now constitute the lands in question. Since 1777 a small portion of this property has been used as a country resort for the pupils and ecclesiastics of the seminary. The portion so used is that now comprised between the Montmorency and Charlevois Railway and the river, as shewn upon a plan in evidence. The ecclesiastics and pupils of the seminary have been accustomed to spend their days of vacation in the summer at Maizerets, and in the winter holidays the ecclesiastics sometimes go there to spend the afternoon. On these holiday occasions the pupils engage in various kinds of amusements provided for them, namely, ball playing, swinging and canoeing, and in summer enjoy rest and fresh air in the shade of the trees. The seminary has no school or house of education at this farm, nor any within the municipality of Limoilou. The residue of the property is worked for farming purposes, and the proceeds of the farm are consumed in the principal establishment of the appellants in the city of Quebec. This latter is the only portion of the property which has been taxed; the part between the railway and the river used by the seminary pupils for sports and recreation having been treated by the respondents as exempted from taxation. That part of the land upon which the taxes in question have been imposed is and always has been used and worked by the appellants as a farm, which produces a revenue of $350 a year. The cost of maintaining the whole establishment including the recreation ground exceeds this sum, but, taking the farm by itself, it is productive of a net profit to the amount stated.

Article 712 of the Municipal Code of Quebec is as follows:—

"The following property is not taxable: (3.) Property belonging to fabriques, or to religious charitable or educational institutions or corporations or occupied by such fabriques institutions or corporations for the ends for which they

were established, and not possessed solely by them to derive a revenue therefrom. (6.) All educational institutions receiving no grant from the corporation or municipality in which they are situated; and the land on which they are erected and its dependencies."

It is not contended that the property in question is a "dependency" of the seminary within sub-s. 6, but it is insisted that the whole of Maizerets is exempt from taxation as property not possessed by the seminary solely for the purpose of deriving a revenue therefrom.

Andrews J., before whom the cause was heard in the Superior Court, seems to have been of opinion that all property belonging to educational institutions, irrespective of the uses to which it might be put, was absolutely excepted from taxation by the first part of sub-s. 3. The learned judge, however, did not proceed exclusively upon this view, which has not been taken by any of the Courts or judges in Canada before whom the present question has arisen for decision, and has not, indeed, been insisted upon either in the Court of Queen's Bench or at their Lordships' Bar.

The ground upon which Andrews J. seems principally to have relied, and that taken by some of the Canadian Courts in other cases, and now insisted upon by the appellants, is not one involving any such question of statutory construction, but relates solely to the application of sub-s. 3 of s. 712 of the Municipal Code to the facts in proof. Can it be said upon the evidence in this record that the seminary did not possess the farm of Maizerets solely for the purpose of deriving a revenue therefrom?

In previous cases in Canada in which this question has arisen diverging opinions have been expressed.

In 1881, in the case of the *Corporation of Verdun* v. *Les Sœurs de Notre Dame* (1) the Court of Appeal of the Province of Quebec held, under facts similar to those of the present case, that the lands were exempt. The late Chief Justice of that Court, Sir Antoine Dorion, however dissented, and in a forcible judgment stated as his reasons for differing the same

(1) (1881) Dorion's App. Cas. 163.

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arguments as those which have prevailed in the present case. In the *Corporation of St. Roch* v. *Seminary of Quebec* (the present appellants) (1), the same Court followed its previous decision in the case of Verdun. In 1884 the question arose in an appeal before the Supreme Court of Canada (*Les Commissaires de St. Gabriel* v. *Les Sœurs de la Congrégation* (2)), and that Court, adopting the opinion of Dorion C.J. in the Verdun case, held the lands in question not exempt from taxation.

If the farm lands of Maizerets upon which it is now sought to impose the taxation in question had been detached altogether from the part of the property lying between the railway and the river, it seems to their Lordships that it would be impossible for the appellants to contend that they were not possessed solely for purposes of revenue, and that none the less could they in that case be said to be possessed for the purposes of revenue because the ecclesiastics and pupils of the seminary were in the habit, after the crops had been harvested, of walking for purposes of exercise over the fields composing the farm. Then, if in the supposed case there would be no exemption, their Lordships are at a loss to see any reason why a difference should be made as regards that actually before them upon the facts in evidence in this appeal. The working of this farm by the appellants cannot be for any other purpose than that of acquiring a revenue therefrom, and it is shewn that they do in fact derive a clear profit from its cultivation; though the absence of this last condition could not make any difference in the disposition which their Lordships think it proper to make of this appeal.

Their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the Court of Queen's Bench for Lower Canada.

The appellants must pay the respondents' costs.

Solicitors for appellant: *Capel-Cure & Ball.*
Solicitors for respondent: *Harwood & Stephenson.*

(1) (1884) 10 Q. L. R. 335. (2) (1884) 12 S. C. R. 45.

[HOUSE OF LORDS.]

THE MAYOR, &c., OF THE MUNICIPAL BOROUGH OF TYNEMOUTH . . } APPELLANTS;

AND

THE ATTORNEY-GENERAL (ON THE RELATION OF THE NEWCASTLE BREWERIES, LIMITED) AND THE SAID NEWCASTLE BREWERIES, LIMITED } RESPONDENTS.

H. L. (E.) 1899 May 16.

Municipal Corporation—Borough Fund—Licensing Appeals—Appeal against refusal of Licence—Payment of Costs of Chief Constable—Municipal Corporations Act 1882 (45 & 46 *Vict. c.* 50) *s.* 140 *sub-ss.* 1–3, *ss.* 141–143, 190, 191, *5th Sched. Part II. clause* 5 (*d*), *clause* 12 — *Municipal Corporations* (*Borough Funds*) *Act* 1872 (35 & 36 *Vict. c.* 91) *s.* 2.

A municipal corporation cannot, where there is no surplus of the borough fund, legally pay thereout costs incurred by the chief constable in opposing by direction of the council appeals against the refusal of justices to renew the licences of publicans.

Quære, whether if there be a surplus it can legally be applied to payment of such costs.

The decision of the Court of Appeal, [1898] 1 Q. B. 604, affirmed.

In August 1895 the chief constable of the borough of Tynemouth was authorized both by the watch committee and the borough council to obtain legal assistance at the ensuing Brewster Sessions. The chief constable accordingly objected to the renewal of certain alehouse licences on the ground that the premises were of a disorderly character, and the justices refused to renew the licences. Some of the licence-holders and their lessors, the Newcastle Breweries, Limited, appealed and gave notice of appeal to the justices, the justices' clerk, and the chief constable. On October 10 at a meeting of the watch committee it was moved that the council be asked to authorize the chief constable to act as respondent in the licensing appeals and to indemnify him against costs. This motion was lost: also one to permit the chief constable to take

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his witnesses to quarter sessions on the appeals. On October 15 the borough council resolved "that the chief constable, who is the respondent in the licensing appeals, be authorized to oppose such appeals, and that the council agree to indemnify him against any costs which he may have to bear or pay in connection with the appeals as such respondent." The chief constable accordingly appeared at quarter sessions and the appeals were dismissed with costs. The costs incurred by the chief constable in the appeals exceeded the amount of costs which on taxation he recovered from the appealing publicans by the sum of 132*l.* 5*s.* On November 19 the new watch committee resolved to direct payment of the above sum. The borough funds account shewed no surplus.

An action was brought against the Tynemouth Corporation by the Attorney-General and the Newcastle Breweries, Limited, claiming (1.) a declaration that the resolution or agreement by the corporation to indemnify the chief constable against costs and any payment of such costs were ultra vires and void, and (2.) an injunction to restrain the corporation accordingly. Under a master's order a special case was stated relating the facts above set out and raising the question for the Court whether the said resolution of the council or agreement by the corporation to indemnify the chief constable was ultra vires, and whether any payment pursuant thereto or any payment of the said costs by the corporation pursuant to the direction of the watch committee would be ultra vires and void, with power to enter such judgment and make such order as should be proper.

The Queen's Bench Division (Grantham and Wright JJ.) made a declaration as prayed in the action and granted an injunction accordingly, on the ground that the resolution of the watch committee of October 10 could not be subverted by the new watch committee of November 19. Their Lordships expressed no opinion upon the larger question. This order was affirmed by the Court of Appeal (A. L. Smith, Chitty, and Collins L.JJ.) on the ground that where there is no surplus of the borough fund such costs cannot be paid out of the fund. (1)

(1) [1898] 1 Q. B. 604.

Against this decision the corporation brought the present appeal.

Feb. 17, 21, 23. *Asquith Q.C.* and *Macmorran Q.C.* (*W. Llewelyn Williams* with them) for the appellants. This appeal raises an important question as to the costs of opposing licensing appeals in cases where (as here) the justices refuse to appear and support their own decisions at quarter sessions. Licensed houses have long been, as Lord Bramwell said in *Sharp* v. *Wakefield* (1), the subject of regulation for police purposes for the maintenance of order. This regulation began very early. By 5 & 6 Edw. 6 c. 25 (the first Licensing Act) justices were to take bond and surety for the maintenance of good order in alehouses. By 2 Geo. 2 c. 28 the granting of licences was regulated. The Licensing Act 1828 (9 Geo. 4 c. 61) introduced a new feature. By ss. 10, 11 notice of applications for the grant or transfer of licences must be served "upon one of the constables or peace officers of the parish or place," thus recognising the right and duty of the constabulary in the matter. These sections were repealed by the Licensing Act 1872 (35 & 36 Vict. c. 94) and other regulations made. By s. 40 sub-s. 1 notice of applications for new licences must be advertised; for transfers of licences notice must be served "on the superintendent of the police of the district." The Legislature must therefore have intended the police to take part in the matter. By s. 36 a register of licences is to be kept in every licensing district and "any officer of police" may inspect the register and take extracts without payment. By the Licensing Act 1874 (37 & 38 Vict. c. 49) s. 16 "any constable" may enter licensed premises to prevent or detect the violation of statutory provisions. Though not required to do so by statute, some of the applicants gave notice to the chief constable of the borough of their appeal to quarter sessions, thus treating him as a party. As the law was then understood (or misunderstood), before the decision of this House in *Boulter* v. *Kent Justices* (2), objecting constables or police were treated throughout as parties. The Municipal Corporations Act 1882 (45 & 46

(1) [1891] A. C. at p. 182.

(2) [1897] A. C. 556.

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Vict. c. 50) by s. 190 constituted a watch committee, and by s. 191 gave the watch committee power to appoint, regulate, and dismiss borough constables. By the Police (Counties and Boroughs) Act 1856 (19 & 20 Vict. c. 69) s. 7 constables must in addition to their ordinary duties perform all such duties connected with the police as the justices or the watch committee require. The police being in this position with regard to licensed houses, the maintenance of order, and the powers of watch committees, the question is whether the costs of the chief constable incurred at quarter sessions can be paid out of the borough funds. This depends on the construction of statutory provisions. By the Municipal Corporations Act 1835 (5 & 6 Will. 4 c. 76) s. 92 a borough fund was created, to be applied (inter alia) "towards the payment of the constables and all other expenses not herein otherwise provided which shall be necessarily incurred in carrying into effect the provisions of this Act"—some of the provisions being for the maintenance of good order. That Act was repealed by the Municipal Corporations Act 1882, which goes further. By s. 140 sub-s. 1 of the latter Act "the borough fund shall be applicable to and charged with the several payments specified in the 5th schedule." By Part II. of Sched. V. certain payments may be made out of the borough fund with an order of the council, and clause 5 enumerates some of them and then (sub-s. (*d*)) says "all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the Borough Constabulary Force." This would include the expenses now in question: the watch committee directed them to be paid, the council approved, and they were for the purposes of the force, one of which is to maintain good order in the borough. And the same remark applies to clause 12 of Part II.—"all other expenses not by this Act otherwise provided for necessarily incurred in carrying this Act into effect." Again s. 140 sub-s. 3 says "no other payment shall be made out of the borough fund except. . . . . (*b*) By order of the council." The council authorized the expenses, in a matter for the good government of the town, and that is enough to justify the payment. By s. 141 the

Queen's Bench Division has a discretionary control over orders of the council for payment of money out of the borough fund, and may wholly or partly disallow or confirm them under a writ of certiorari. If the Queen's Bench Division does not disallow it an order of the council for payment is valid. By s. 143 the surplus of the borough fund "shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough."

The payment may also be justified under the Municipal Corporations (Borough Funds) Act 1872 (35 & 36 Vict. c. 91) which was passed in consequence of the decision in *Reg.* v. *Mayor of Sheffield*. (1) Sect. 2 empowers the governing body, that is the council, "to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants," and to apply the borough funds to the payment of the costs and expenses. And by s. 8 nothing in the Act is to affect provisions in other Acts for the payment of expenses, or diminish the powers of governing bodies. Under these statutory provisions the council have a discretion which if honestly exercised for the good government of the town ought not to be interfered with: *Attorney-General* v. *Mayor of Brecon* (2); *Attorney-General* v. *Corporation of Blackburn* (3); and see *Reg.* v. *Mayor of Gloucester* (4); *Reg.* v. *Mayor of Exeter*. (5) Any person may appear and oppose the renewal of a licence, either at the licensing sessions or at the quarter sessions on appeal. The only statutory restriction is as to the opposing of new licences: Licensing Act 1872 s. 43. Before *Boulter* v. *Kent Justices* (6) was decided in this House it was supposed that the party objecting before the justices to the renewal of a licence was a necessary party to the appeal and was liable to costs. That decision was that the licensing justices are not a court of summary jurisdiction, and that on appeal the court of quarter sessions has no power to give costs against the objector, and that *Reg.* v. *Glamorganshire Justices* (7)

(1) (1871) L. R. 6 Q. B. 652.
(2) (1878) 10 Ch. D. 204.
(3) (1887) 57 L. T. (N.S.) 385, 388.
(4) (1844) 5 Q. B. 862.
(5) (1880) 6 Q. B. D. 135.
(6) [1897] A. C. 556.
(7) [1892] 1 Q. B. 661.

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was bad law. But it was not held that the police have no locus standi on an appeal or that they could not be heard. The court of quarter sessions can hear any person it thinks right, and ought to hear the police who objected at the licensing sessions and upon whom notice of appeal has been served. If the police think it essential to good order that the licence should be opposed and succeed before the licensing justices, are they not justified in opposing an appeal, when directed to do so by the watch committee or the council? At all events by the presence of the police superintendent? And if by him, why not by counsel, solicitor and witnesses? How else is good government of the borough to be kept up? The justices are not bound to appear on the appeal and support their own decision, and there is no way of compelling them. Suppose (as in this case) they refuse to appear, is the Court to be without assistance in aiming at the truth? There is a difference in the practice at quarter sessions. At some the appellant begins and has to prove his case. At others the respondents begin, and if the justices do not appear, the decision is reversed without the appellant being called on. What chance of justice being done is there in a case like the present if the police are not to be heard? The Licensing Act 1872 implies that a party who serves written notice of an intention to oppose the renewal of a licence has a right to appear before the justices—s. 42 sub-s. 2; and if before them why not before the quarter sessions? Where a case was stated by justices it was held that the superintendent of police who had opposed before the justices and to whom notice in writing of the appeal had been given by the appellant, was on that account rightly made respondent: *Price* v. *James*. (1) The chief constable was here served with notice by some of the applicants.

Lawson Walton Q.C. and *Willes Chitty* for the respondents. The chief constable is not the servant of the watch committee, but even if he were they directed him not to appear at quarter sessions. Then he asked the direction of the council, but they have no authority over him, and had no right to intermeddle in the appeal. The relations between the chief constable and

(1) [1892] 2 Q. B. 428.

the watch committee and the powers of the committee and the council are stringently defined by statute, and there is nothing in the Acts expressing or suggesting a power in the committee or the council to authorize the chief constable to interfere in licensing matters. The justices are the licensing authority: it is their duty and their right to appear at quarter sessions and support their own decisions. Any assistance or information they require from the police they can ask for or can be offered to them, and in a proper case no justices would refuse to appear. The Licensing Act 1828 is still the only Act as to licensing procedure, and it provides for everything necessary in appeals. By s. 27 any person who shall think himself aggrieved by any act of any justice may appeal to quarter sessions, provided he serves notice of appeal—upon whom? Not upon the police or the objecting party but upon the justice. No one but the justices is recognised by the Legislature as having any interest in opposing the appeal. The practice of serving notice upon the objecting party is not warranted by statute and is wholly irrelevant. Then s. 27 goes on to enable the court of quarter sessions to hear the appeal and make such order "with or without costs" as to the Court shall seem meet. Sect. 29 deals with all possible results of the appeal, the appeal being dismissed, or the judgment appealed against either affirmed or reversed, or the appeal abandoned, and enables the Court in different ways to indemnify the justices from all costs in every event. The only costs which the Act contemplates are costs between the appellant and the justices. No objector is provided for or thought of, and even as respects the justices there is no power to give costs against them. Since the decision in *Boulter* v. *Kent Justices* (1) the law is that there is no litigation either before the licensing justices or before the quarter sessions, and therefore there are no parties: see *Reg.* v. *Staffordshire Justices*. (2) There being no parties the objectors, whether police or not, cannot be heard: the quarter sessions have no power to hear them: they can only hear the justices.

The construction put by the appellant upon the Municipal Corporations Act 1882 and the Municipal Corporations (Borough

(1) [1897] A. C. 556. (2) [1898] 2 Q. B. 231.

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Funds) Act 1872 is forced, unnatural, and not warranted by any expressions in the Acts. The words "all other charges and expenses" in the Act of 1882 must mean charges ejusdem generis with those already specified, which have no reference to licensing matters. See *Reg.* v. *Mayor of Liverpool* (1); *Reg.* v. *Mayor of Exeter*. (2) The expressions in the Borough Funds Act 1872 refer to the promotion or protection of the direct interests of the inhabitants in such matters as water, gas, roads, and similar undertakings. Licensing matters are not contemplated. If the appellants' construction is correct the council might expend the borough funds on any matter they pleased, subject to the discretion of the Queen's Bench Divison. The opposing of licensing appeals is altogether outside the functions of a municipal corporation: see per Jessel M.R. in *Attorney-General* v. *Mayor of Brecon*. (3) Nor is there any power at common law to make such payments.

Asquith Q.C. in reply.

The House took time for consideration.

May 16. LORD MACNAGHTEN. My Lords, on this appeal your Lordships are called upon to determine whether a municipal corporation is justified in applying the borough fund, when the fund depends for its sufficiency on a borough rate, in payment of costs incurred by the chief constable under the order of the council in opposing the renewal of a publican's licence at quarter sessions.

The question was argued very fully and very ably on both sides. In his opening address the learned counsel for the appellants suggested considerations of a general character which at one time led me to think that the appeal might perhaps be supported without straining unduly the language of the Acts relating to municipal corporations. That municipal corporations have been constituted to the intent that cities, towns, and boroughs might be "well and quietly governed" is no more than what is declared in the preamble of the Municipal Cor-

(1) (1872) 41 L. J. (Q.B.) 175. (2) 6 Q. B. D. 135.
(3) 10 Ch. D. 204, 223.

porations Act of 1882. That the proper regulation of licensed houses within a borough is essential to its good government and to the peace and quiet of the inhabitants, and that an increase in the number of public-houses out of proportion to the wants of the neighbourhood may come to be a nuisance and a public mischief, are propositions which most men of moderate views would, I suppose, admit. Then it was observed that the appointment of borough constables and the care and superintendence of the constabulary force have been entrusted to the watch committee of the borough council; and it was shewn that in various ways in connection with the administration of the licensing laws the services of the police are made use of, either under the express directions of some statute or as a matter of convenience if not of necessity. All this is perfectly true. And if nothing appeared to the contrary it might well be inferred, as your Lordships were asked to infer, that the action of the borough council which has been challenged in this suit was fairly within the scope of municipal government. But a careful consideration of the licensing laws, with the light thrown upon the subject by the recent case of *Boulter* v. *Kent Justices* (1) in this House, leads to the conclusion that the administration of those laws has been committed not to municipal councils as such but to another and a different body, the justices of the peace. There is no warrant that I can find for borough councils taking upon themselves the functions of the justices.

The ground having been so far cleared, it would seem to follow that the expenditure objected to by the respondents does not come within the description of "expenses necessarily incurred" in carrying into effect the Act of 1882; and, further, that the argument in favour of the appellants' contention can not be made to depend in any measure on considerations lying outside the Acts which deal expressly with the application of the fund known as the borough fund. I turn, therefore, to the provisions of the Municipal Corporations Act 1882 and the Borough Funds Act 1872, on both of which the learned counsel for the appellants relied. It is not necessary to trouble your

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Lordships with a detailed examination of those Acts; they are very fully discussed in the judgments of A. L. Smith and Chitty L.JJ., and I cannot see any reason to differ from the conclusions at which those learned judges arrived.

In the first place, your Lordships' attention was called to the provisions found in Sched. V. of the Act of 1882 relating to payments in respect of the borough police. By the conjoint operation of s. 140 and Sched. V. the borough fund is made applicable to certain specified payments falling under that head, and then comes in the schedule a comprehensive clause which expressly includes "all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the borough constabulary force." That clause would cover all expenses in connection with the raising, equipping, and maintaining the constabulary force; but it seems impossible to extend it to expenses incurred by the chief constable in discharging duties outside the functions of the borough council and the functions of the chief constable as their officer.

The next argument was certainly a very bold one. The payment in question has the sanction of an order of the borough council. That sanction, it was said, is enough for the present purpose. All payments by order of the council must be held good unless and until they are disallowed by the order of the Queen's Bench Division of the High Court under the provisions of s. 141. This argument, which seems to be contrary to the spirit and intention of the Act and would tend to place the borough fund very much at the mercy of an unscrupulous majority in the borough council, is founded on the letter of sub-s. 3 (*b*) in s. 140. Sched. V., to which I have already referred, divides payments out of the borough fund into two classes—those which may and those which may not be made without an order of the council. Sect. 140 begins by saying that the borough fund shall be applicable to and charged with the several payments specified in Sched. V. It declares (sub-s. 2) that the payments specified in Part I. of that schedule may be made without order of the council, and that those specified in Part II. may not be made without such order;

and then it enacts (sub-s. 3) that no other payment shall be made out of the borough fund except in five specified cases—one of the excepted cases is this: "(*b*) by order of the council." It is not very easy to understand why s. 140 is framed in the way in which it is expressed. To a great extent the excepted cases seem to be a repetition of cases to be found in Sched. V. But it must be borne in mind (as A. L. Smith L.J. points out) that sub-s. 3 is a restraining and not an enabling section. It does not say that the borough fund may be drawn upon by the order of the council for any purpose they think fit, but that no payments shall be made thereout other than those specified in Sched. V. except by the order of the council and in the four other excepted cases. Now certainly there are cases not specified in Sched. V. and not falling within the other excepted cases in sub-s. 3 in which payments may be made out of the borough fund, as, for example, there are payments which may be made under s. 143 when the borough fund has a surplus. But still those payments must be made by order of the council, and the order must be authenticated by the signatures of three members of the council and countersigned by the clerk. That, I think, is what sub-s. 3 (*b*) of s. 140 was intended to point to and emphasize. The obscurity, such as it is, has arisen, I think, from the superabundant caution of the draftsman, and not from any intention to relax the fetters imposed on borough councils as trustees of the borough fund. It would be absurd to suppose that in an Act which carefully defines and specifies the payments to be made out of the borough fund, and which had certainly for one of its objects economy in the administration of that fund, there should have been designedly inserted a provision which would obviously leave a loophole for unlimited extravagance.

Lastly, the learned counsel for the appellants relied on the Borough Funds Act 1872. That Act authorizes in certain cases the application of the funds of municipal corporations and other governing bodies to purposes to which they would not otherwise be applicable—one of those cases is when in the judgment of the governing body in any district it is expedient for such governing body to prosecute or defend any legal

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proceedings necessary for the promotion or protection of the interests of the inhabitants of the district. It was objected on behalf of the respondents that the proceedings on which the appellants embarked in the case of the appeal to quarter sessions were not "legal proceedings" within the meaning of the Act, and that if they could be properly so described they were not necessary for the protection of the interests of the inhabitants. I am inclined to agree with them on both points. But it is not necessary to express a final opinion on the subject or to define the proceedings to which the Act extends. It is enough to say that if the appellants could have brought themselves within the protection of the Act they have not done so. Whatever may have been the views of individual members of the council, it is clear that the governing body as a body have neither formed nor expressed any judgment on the expediency of the proceedings which they authorized; and if that difficulty were out of the way, it is clear that the costs and expenses now in question have not been examined and allowed in manner prescribed by s. 6 of the Borough Funds Act 1872. It is equally clear that without such examination and allowance no costs, though properly incurred under the Act, can become chargeable on the borough fund. Perhaps I may add that I should venture to doubt whether any officer appointed by one Her Majesty's Secretaries of State or by the Local Government Board would have allowed that luxury in litigation in which, according to the bill of costs in evidence in this case, the appellants appear to have indulged.

I do not think it necessary to notice the point on which the decision of the Divisional Court turned, beyond saying that I share the doubts expressed in the Court of Appeal as to whether the point was a good one.

I beg to move that the appeal be dismissed with costs.

LORD MORRIS. My Lords, I am also of opinion that the order of the Court of Appeal should be affirmed. *Boulter* v. *Kent Justices* (1) appears to me to decide that the chief constable had no right to appear as a party. He did so, how-

(1) [1897] A. C. 556.

ever, and having been called in by the parties appealing to the quarter sessions he got his costs there from them, but that cannot entitle him to get his extra costs out of the borough fund.

In order to raise the points relied upon by the appellants in this case on sub-s. (*d*) of the 5th clause of the schedule to the Municipal Coporations Act 1882, or upon the Municipal Corporations Borough Funds Act 1872 s. 2, as entitling the appellants to make the order for payment of these extra costs, it appears to me to be necessarily founded on the idea that the head constable had a right to appear as respondent at the hearing—which he had not.

The remaining point relied upon by the appellants, namely, s. 140, sub-s. 3 (*b*), presents but little difficulty. That section provides for the application of the borough fund, first, in the payments specified in the 5th schedule; the payments specified in Part I. of that schedule may be made without the order of the council, while those specified in Part II. may not be made without such order. Then comes sub-s. 3, which says that no other payment shall be made out of the borough fund except under authority of an Act of Parliament—by order of council, by order of court of quarter sessions, by order of justices in pursuance of the Act, &c. Sub-s. 3 is not an enabling section; it purports to be a disabling section, but excepts from disability, payments *a*, *b*, *c*, *d*, and *e*, all of which must be open to revision and the legality to be challenged: otherwise every order of the council and every order of a justice could go unchallenged.

It is said, however, that there is a special mode of testing the validity of all orders of the council by the provisions of sect. 141, sub-s. 2, enabling any order to be removed into the Queen's Bench Division by certiorari, and that consequently this is the only mode of interfering with or controverting any order of the council for a payment, however illegal. I cannot adopt that view. While the Queen's Bench Division is given full authority over every order of the council, it is not enacted, or suggested in the enactment, that that is to be the sole remedy, nor is there anything to deprive the Attorney-General,

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at the relation of a party interested, of the power of obtaining by injunction an order to restrain the payment of money being made under an order of the council, for which order there was no legal warrant.

LORD SHAND. My Lords, I am of the same opinion, and having had an opportunity of reading the judgment of my noble and learned friend now on the Woolsack, I concur in the grounds of that judgment as the grounds upon which this appeal should be dismissed.

It would serve no good purpose again to go over the various provisions of the statutes which have been the subject of argument—I mean the Act of 1882 with its relative schedule and the Act of 1872. I express my entire agreement with the observations of Smith L.J. in the Court of Appeal. His Lordship has with great pains gone fully through those sections, and I certainly have nothing to add to what he has said.

The case is one in which there is no surplus of funds in the hands of the corporation, and it would require the levying of a rate to meet these expenses at present; but I think it right to say that my consideration of the case has led to this at least, that I should have very great difficulty in holding, even if there were a surplus, that the costs in question in this case could have been taken out of it.

I am therefore of opinion, with your Lordships, that the appeal should be dismissed.

LORD DAVEY. My Lords, I agree in thinking that the appeal in this case should be dismissed, and I agree generally with the reasons stated by A. L. Smith L.J. in his very careful judgment. I will only add a few words on the construction of s. 140 sub-s. 3 (*b*) of the Municipal Corporations Act 1882 which raises a question of some importance and interest. It will be observed that sub-ss. 1 and 2 of that section provide for what may be called the normal expenses of the borough. Sub-s. 3 provides that no other payment shall be made out of the borough fund except under certain special circumstances which are enumerated—that mentioned in (*b*) is, "by order of

the council." That must mean some order which the council is competent to give. It is not an enabling section and cannot mean any order which the council may think fit to give subject only to the disallowance thereof by the Queen's Bench Division under s. 141. I ask myself, therefore, what expenditure can be ordered by the council beyond the normal expenditure authorized in Sched. V. I find it in s. 143, which enables the surplus of the borough fund to be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. I think that this section supplies a meaning to the large words in s. 140 sub-s. 3 (*b*), and that so read the enactment in that sub-section is made intelligible and consistent with the rest of the Act. There may be other purposes not included in Sched. V. to which the borough rate may be applied by order of the council, but I cannot at present name any.

But in truth, my Lords, I doubt whether it is necessary to enter into these questions in the present case. I am of opinion that the decision of this case is impliedly settled by the judgment of this House in *Boulter* v. *Kent Justices*. (1) The points immediately decided in Boulter's case were, (1.) that a person appearing before a licensing meeting of justices to object to the grant or renewal of a licence does not become a "party" to the proceedings; (2.) that proceedings in an appeal from the justices sitting at a licensing meeting are still regulated by the Licensing Act 1828 and not by the Summary Jurisdiction Acts. If so I think that an objector before the licensing meeting has no right to appear and be heard on the appeal to quarter sessions. The only proper respondents to the appeal are the justices themselves, who are served and may appear in the interests of the public to support their own decision. Provision is made in the Licensing Act for their costs, but not for those of any other person appearing to oppose the appeal. If an objector appears on the appeal he does so voluntarily, and his counsel can only be heard by permission of the bench as amicus curiæ, and he can neither receive nor be ordered to pay costs. He is not, in short, a "party" to the proceedings.

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True, the chief constable in this case was served by the present respondents, the Newcastle Breweries, with notice of the appeal, but, as it now appears, under a mistake, and if he had not appeared no order could have been made against him. Whatever right the town council or the watch committee may have to direct the chief constable to appear in the interest of the municipality on a proceeding to which he is a proper party and to indemnify him against costs properly incurred in the defence of the public interests, it is difficult to maintain that they can properly indulge in the luxury of a gratis appearance or instruct counsel to appear with a watching brief to see that the justices properly support their decision or can pay the expenses of such appearance out of the rates. It is not the chief constable's duty to do, and the watch committee cannot order him to do, what, as it appears to me, the procedure in such appeals does not contemplate or provide for.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 16, 1899.

Solicitors for appellants: *Lloyd-George, Roberts & Co., for H. A. Adamson, Tynemouth.*

Solicitors for respondents: *Godden, Son & Holme.*

[HOUSE OF LORDS.]

HUNTER AND OTHERS . . . . . APPELLANTS; H. L. (E.)

AND 1899

THE ATTORNEY-GENERAL AND HOOD RESPONDENTS. *May* 18.

Charity—Will—Failure of Gift—Bequest of Trust Funds to be applied "in Grants for or towards the Purchase of Advowsons or Presentations."

A bequest to trustees to expend the income or any portion of the trust funds "in grants for or towards the purchase of advowsons or presentations" is not a good charitable bequest.

A testator by his will declared that his residuary estate or so much thereof as should be legally applicable to charitable purposes should be transferred by his general trustees to special trustees in trust to apply the income or any portion of the capital "in grants for or towards the purchase of advowsons or presentations, or in creating or contributing to the erection, improvement or endowment of churches, chapels or schools, or in paying or contributing to the salaries or income of rectors, vicars or incumbents, masters or teachers"; but upon certain conditions. The conditions were framed with a view to the promotion of "true Protestant and Church of England principles as held by those of her divines, clergy and members who are distinguished as Evangelical," and though applicable to the other purposes were not applicable to the purchase of advowsons or presentations:—

Held, that since upon the true construction of the will no trust, charitable or other, which the Court could execute or control was annexed to the advowsons or presentations for the purchase of which the trustees had power to make grants, and there was no general trust for charity binding the whole fund, the whole gift failed and the residuary estate was undisposed of.

The decision of the Court of Appeal, *In re Hunter*, *Hood* v. *Attorney-General*, [1897] 2 Ch. 105, reversed and the decision of Romer J., [1897] 1 Ch. 518, restored.

By his will dated May 26, 1877, Edward Hunter gave (in the events which happened) all the residue of his estate real and personal to his executors and general trustees with a declaration that upon the happening of certain events the residue or so much thereof as should be legally applicable for charitable purposes should be paid or transferred by his general trustees for the time being to special trustees to be held and applied by

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them upon the trusts and in manner following, that is to say: "The special trustees may retain or invest such part of my residuary estate as shall come to or devolve upon them in or upon any stocks funds shares or securities which they may think proper, and whether of the class hereinbefore prescribed by me or not, and they may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations, or in creating or contributing to the erection improvement or endowment of churches chapels or schools, or in paying or contributing to the salaries or income of rectors vicars or incumbents masters or teachers, but upon the following conditions: (1.) That only such churches or chapels shall be subscribed or contributed to wherein the service shall in the opinion of the special trustees be conducted upon pure Protestant and Church of England principles, by which I mean the principles of the Church of England as held and inculcated by those of her divines clergy and members who are distinguished as Evangelical and loyal to the work and fruits of the Reformation and as holding doctrines and principles free from all Popish or Roman Catholic tendency and opposed thereto. (2.) That only such schools shall be subscribed or contributed to wherein true Protestant and Church of England principles are distinctly taught and inculcated, with preference to those established for children of the poorer classes. (3.) That only such masters and teachers receive grants who best shew forth by their teaching and example true Protestant and Church of England principles. (4.) That no payment shall be made directly or indirectly to or for the benefit of any rector vicar or incumbent unless upon condition that he shall if not prohibited in law at the principal Sunday morning service in his church selecting a time and state of weather when the congregation is supposed to be the greatest read the 39 Articles of the Church of England and which I recommend he should make the subject of his discourse from time to time. And upon further condition that he shall on the first Sunday of every month at the chief morning service preach a sermon on 'Love' from a text taken from the Gospel Epistles or Revelations of St. John. And I declare that if the special trustees shall find or consider

that any rector vicar or incumbent master or teacher shall preach teach publish inculcate encourage adopt or follow any doctrines or practices which shall be contrary to or at variance with true Protestant and Church of England principles he or she shall be disqualified from receiving any benefit under this my will. And it being my wish that as much as possible of my residuary estate shall be applicable and available for administration by special trustees in manner aforesaid I declare that all my debts funeral and testamentary expenses and the duty on all legacies under this my will or any codicil not payable by the legatees shall be raised and paid out of such parts of my residuary estate as are not legally applicable to charitable purposes, to the exoneration of the residue thereof, and that no part of my residuary estate which shall be so legally applicable shall be invested or dealt with so as to make the same inapplicable or unavailable for those purposes." The will then appointed certain persons (all of whom predeceased him) to be the first special trustees of his will and declared "that if they shall decline to act as such, then special trustees shall be nominated by my general trustees for the time being, who I am sure will select men who may be depended upon to respect and fulfil my wishes."

The testator died in July 1896, leaving personalty worth between 80,000*l.* and 90,000*l.*, and realty of small value. The respondent Hood, being the surviving executor and general trustee, issued a summons for the determination of the question (inter alia) whether the trusts by the will declared and entrusted to special trustees were void or were valid as charitable trusts or otherwise. To this summons the Attorney-General and the testator's heir-at-law and next of kin were made defendants. Romer J.—being of opinion that the liberty to the special trustees to expend the income or any portion of the capital of the trust fund in grants for or towards the purchase of advowsons or presentations was not a valid charitable bequest, and that the whole gift therefore failed—declared that upon the true construction of the will the trusts declared and entrusted to special trustees were void and that the testator's residuary real and personal estates were undisposed of, all taxed costs to

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be paid out of the estate. (1) The Court of Appeal (Lindley, Lopes and Rigby L.JJ.) reversed this decision and declared that the residuary real and personal estates were devised and bequeathed upon good and valid charitable trusts which ought to be carried into effect accordingly, all taxed costs to be paid out of the estate. (2) Against this decision the heir-at-law and next of kin brought the present appeal.

1898. Nov. 17, 21, 22. *Cozens-Hardy Q.C.* and *Levett Q.C.* (*George Lawrence* with them) for the appellants. The Lords Justices have read words into the will which are not there, and have treated the will as if it declared a charitable trust with regard to the purchase of advowsons and presentations. The testator may have intended such a trust, but he has not expressed it. Even if the words supposed to be inserted were there, there would be no charity, as Romer J. said. Briefly, the trust for the first purpose is not valid as a charity if it does not increase the number or value of livings, and if it excludes from selection a large number of duly qualified clerks. But independently of that point, as the will is expressed there is no trust for charitable purposes within the meaning of the term accepted by the Court of Chancery. No trust of any kind is declared of the advowsons, and a gift of money simply for the purchase of advowsons is not a charitable trust: *Attorney-General* v. *Webster* (3), per Jessel M.R. (4) The only cases in which such gifts have been said to be charitable are where there has been a trust for the benefit of the parish, or where the parson is to be chosen by the parishioners. Thus this part of the bequest is not for a legal charity; especially as the gift is "for or towards" the purchase of advowsons, so that it is not contemplated that the trustees will have the control. If one out of several objects to which the fund may be applied is not charitable, the whole gift fails: *Morice* v. *Bishop of Durham* (5), per Sir William Grant M.R., affirmed by Lord Eldon. (6) Where there is a general and undefined trust, giving an option

(1) [1897] 1 Ch. 518.
(2) [1897] 2 Ch. 105.
(3) (1875) L. R. 20 Eq. 483.
(4) L. R. 20 Eq. at p. 491.
(5) (1804) 9 Ves. 399.
(6) (1805) 10 Ves. 521, 537.

in the trustees to do as they like, the Court will not give effect to the gift as a charity: *Vezey* v. *Jamson*. (1) The gift is too indefinite, and the Court will not apportion among the several objects indicated or treat it as a charitable trust: *James* v. *Allen* (2); *Ommanney* v. *Butcher* (3); *Williams* v. *Kershaw* (4); *Ellis* v. *Selby*. (5) The indefiniteness of the objects and the wide discretion in the trustees are fatal to the contention that this is a good charitable gift. "The question," as expressed by Sir W. Grant in *Morice* v. *Bishop of Durham* (6), "is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it." The authorities are fully discussed in *In re Macduff*. (7)

Sir R. E. Webster A.-G. and *Ingle Joyce* (*Dibdin* with them) for the respondent, the Attorney-General. The real intention of the testator was to create a trust to make grants, not to purchase advowsons, and the view taken by Rigby L.J. is correct. Such a purpose constitutes a good charity. But even the purchase of advowsons by trustees acting under such conditions as are here prescribed, and which apply to the first purpose as well as to the others, is a charity. There can be no difference between giving 1000*l.* to buy an advowson and giving it to build a new church. The holding of livings by trustees has long been recognised by statute, and though in perpetuity such a trust is valid as a charity. Such a trust was held to be a good charity in the case of *In re St. Stephen, Coleman Street*. (8) And see *Foley* v. *Attorney-General* (9); *Wilson* v. *Dennison*. (10) The Lord Chancellor's Augmentation Act 1863 (26 & 27 Vict. c. 120) gives statutory recognition to the principle. The charitable purpose will not be defeated even if one of the objects is not a charity: *In re Douglas*. (11) There is no case in the books to the effect that a trust will fail merely because an object is included which is not of a charitable character. *Salusbury* v. *Denton* (12) shews the contrary. *Morice's Case* (6)

(1) (1822) 1 S. & S. 69.
(2) (1817) 3 Mer. 17.
(3) (1823) T. & R. 260, 270.
(4) (1835) 5 Cl. & F. 111, n.
(5) (1836) 1 My. & Cr. 286.
(6) 9 Ves. 406.
(7) [1896] 2 Ch. 451.
(8) (1888) 39 Ch. D. 492.
(9) (1721) 7 Bro. P. C. 249.
(10) (1749–50) Amb. 82.
(11) (1887) 35 Ch. D. 472.
(12) (1857) 3 K. & J. 529.

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has no application. If money is well given to charity, the Court will carry out the intention even if there are no trustees.

[LORD DAVEY referred to *In re Sutton.* (1)]

The primary object is not to buy advowsons, but to make grants, and the Simeon Trustees, whom the testator appointed his own trustees, hold hundreds of livings. It would not, for example, be a breach of trust if the trustees had either made a grant to a Simeon living, or bought such living. The validity of such a trust as this is shewn in *Sinnett* v. *Herbert* (2), per Lord Hatherley, who held that a gift for the endowment of a future church is not void. The mere vesting of a discretion in the trustees does not vitiate the trust: the Court cannot say whether the gift is good or bad until the discretion is exercised: *Pocock* v. *Attorney-General.* (3)

[LORD WATSON referred to *Kendall* v. *Granger* (4)]

[They also referred to *Towns* v. *Wentworth* (5); *Bruce* v. *Presbytery of Deer* (6); *Down* v. *Worrall.* (7)]

W. C. Druce for the respondent Hood.

Cozens-Hardy Q.C. in reply. Most of the cases cited for the respondent are cases of construction and have no application. As to the fourth condition, payment to a person may be withheld if he ceases to teach Evangelical doctrine. *Kendall* v. *Granger* (4) shews that the trustees are bound to apply to charity if the gift is to be upheld; and a century of authorities proves that a gift partly for a perpetuity and partly for a charity wholly fails.

[They also cited *In re Bridger.* (8)]

The House took time for consideration.

May 18. EARL OF HALSBURY L.C. My Lords, it does not appear to be doubted that if Romer J. was right in holding that the first purpose, which the testator in this case has described as being a purpose to which some part or all of the fund, according to the discretion of the trustees, may be applied, is not "charitable" in the sense in which that word is under-

(1) (1885) 28 Ch. D. 464.
(2) (1872) L. R. 7 Ch. 232, 242.
(3) (1876) 3 Ch. D. 342.
(4) (1842) 5 Beav. 300.
(5) (1858) 11 Moo. P. C. 526.
(6) (1867) L. R. 1 H. L., Sc. 96.
(7) (1833) 1 My. & K. 561.
(8) [1893] 1 Ch. 44; [1894] 1 Ch. 297.

stood by the Court of Chancery, then the whole gift must fail. It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void, and I do not understand any of the judges of the Court of Appeal to question that doctrine; but, in a manner I shall refer to presently, each of the learned judges gives reasons tending to shew that Romer J. was wrong in saying that the first purpose in question was not a charitable gift.

Now, it will hardly be contended that if the words stood alone the purchase of advowsons and presentations is a charitable purpose, and it certainly cannot be said that the trustees appointed by the testator might not devote every farthing of the fund in their hands to that one purpose. It is equally clear that he has declared no trust in respect of the advowsons or presentations when purchased.

Now, the process of reasoning by which the Court of Appeal has come to the conclusion that they have the right to read the testator's will as establishing a charitable trust on the words to which I have referred is this: they say that they are sufficiently satisfied of the testator's intention by referring to other parts of his will; and I so far agree that, judging of his religious views by what he has said in other parts of his will, I have no doubt whatever that his general intention was to aid the particular school of religious thought in the Church of England to which he was himself attached; but it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words and declare trusts which are not to be found in the will itself—that, to put it plainly, the testator's intention is to be judged by the general desire that he has expressed to have his money devoted to such a purpose. To create a trust by such a process of argumentation as that appears to my mind to be not interpreting the will, but making a will for the testator.

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The Master of the Rolls says, with the candour which always distinguishes that learned judge, "I do not say the words fit it, but you can see plainly enough what the testator is driving at." Again, he says, "It is true he" (the testator) "has not said, in so many words, that that part of his residuary estate which may be applied towards the purchase of advowsons or presentations is to be held when obtained upon the particular trusts." Again he says, "you are to look and see what the drift of the whole thing is, and, looking at it from that point of view, although I quite feel it is difficult to fit the words in so as to make them accurately applicable, I think," and so on.

Lopes L.J. puts the argument in a more compendious but, I think, in a more obviously fallacious way when he says, "What object could he" (the testator) "have in view when he directed these special trustees to spend large sums of money in buying advowsons or presentations except to advance religion in that particular form of Protestant religion?" Rigby L.J. says, "I will take a more general view of it. What did the testator mean? He meant to carry out his object by means of churches and chapels and schools—he says churches, chapels, or schools—it is either churches, chapels, or schools—and through the instrumentality of rectors, vicars, and incumbents, and masters or teachers. There and then from that it appears to me plain that he was intending, as far as he could, to devote his property, capable of being applied to charitable purposes, for the purpose of religion or education. I do not say that we have got quite through, but we are advanced. We find that, by means of churches, chapels, or schools, and rectors, incumbents, or teachers, he was going to have this money made available." Now, my Lords, I venture to say that if you were to suppose that every one of the words which the learned Lord Justice has used was in the will itself, it would advance the learned Lord Justice's argument no whit further. The point is this: whatever his general intention may be, the testator has not done it. I must not omit to notice what the Master of the Rolls put as the cardinal and crucial question:—Suppose the trustees here had proceeded to appoint a ritualistic clergy-

man, would not the Court restrain them? I admit that that is a plausible mode of putting the difficulty; but is it in reality anything else than giving a startling illustration of what the consequences would be if the testator, notwithstanding his general intentions, had not made sufficient provision for giving effect to his intentions? Is it any more than again stating the very question your Lordships have to decide—that which the Master of the Rolls has described as the crucial question? Is it not only another mode of putting the point which he has already dealt with, and—with all respect to him I venture to say—not successfully? And after all it is only what always happens when the testator forgets to give verbal expression to what may nevertheless be in his mind.

My Lords, admitting freely what each of the learned judges has said, I am unable to agree that such general intention, not carried out by appropriate words in the will itself, can give any Court the right to place the words there for him—that is, as I have said, to make a will, not to interpret the will. You might as well argue that because you can discover that some one was the object of the testator's affection you should invent a bequest for him, since he did not mean to die intestate, and he must therefore have meant to leave something to the object of his affection; that because you find general expressions in a will of affection and regard for certain persons, although there are no words in which provision is made for them, you are to interpret the will in such a way as in a large and general sense may be said to satisfy the wishes of the testator. The plain fact remains in this will that the testator has not declared the trust that the Court of Appeal have imagined for him, and no apt words have been found to fit or give effect to his supposed intention; and I think your Lordships are not justified in taking such a liberty of interpretation. That certainly would be a strange mode of construing a will, that because you cannot find what else he must have intended to be done with his money except something of that nature, although it is admitted that there are no words in the will to convey the intention which it is suggested he had in his mind, you can invent provisions and impose conditions which the testator himself

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has not introduced. With the utmost respect for the learned judges of the Court of Appeal, I say that that would be admitting a latitude of interpretation and a looseness in the application of words in wills expressing the general intentions of the testator which, although in this particular case it might do no harm, would let in a mode of interpreting wills which would cast upon the Court, in almost every case of a defectively made will, the necessity of making the will for the testator—not interpreting the words which he has actually used.

For these reasons, my Lords, I am of opinion that the judgment of the Court of Appeal ought to be reversed, and the judgment of Romer J. restored.

LORD WATSON. My Lords, I have had an opportunity of considering and I entirely concur in the terms of the judgment prepared by my noble and learned friend, Lord Davey.

LORD SHAND. My Lords, after very careful consideration, induced by the circumstance that the House is about to reverse the unanimous decision of the Court of Appeal, I agree in thinking that your Lordships should revert to the judgment of Romer L.J. That learned judge has held that while the testator, with reference to the first of the several purposes to which he has authorized the residue of his estate to be applied, has stated that his trustees "may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations," yet there is no provision to be found in his will that the advowsons or presentations so purchased, or for or towards the purchase of which grants may be given, shall be affected by any charitable trust, or indeed by any definite trust whatever—and I concur in that view.

The testator has authorized his special trustees to apply the income or any portion of the capital of the residue of his estate in three different ways: first, in the purchase of advowsons or presentations; or, secondly, in the erection, improvement, or endowment of churches, chapels, or schools; or, thirdly, in paying or contributing to the salaries or income of rectors,

vicars, or incumbents, masters or teachers. There is no direction to apportion the funds and apply part to each of these purposes. The trustees might in their discretion apply the whole income and capital to any one of the three; and it follows that, if it be held that one of the purposes is not charitable, there is not an effectual charitable bequest of the residue as a whole.

I agree with the learned Master of the Rolls that the words, "but upon the following conditions," which immediately succeed the enumeration of the three trust purposes, taken grammatically, apply to all that has gone before; but so reading the will, I can find no condition which has application to advowsons or presentations. These conditions, which make it clear as regards the second and third trust purposes, relating to churches, chapels, or schools, and to rectors, vicars, and teachers, have by the language used no application and no relation to advowsons or presentations. It is said in his Lordship's judgment: "I do not say that the words fit it, but you can see plainly what the testator is driving at." With the utmost respect for the learned judge, I should say that is not enough. I see much in the provisions of the will relating to the endowment of churches or schools and the contributions to the income of rectors or teachers which leads me to think the testator intended to make similar provisions in regard to grants for the purchase of advowsons or presentations; but assuming he had that intention, he has in my opinion failed to express it, and I say so of course taking the will as a whole. The question is not one for speculative reasoning: "What do you think was the testator's intention?"—but "What has he expressly or by implication (but by necessary implication where implication only is relied on) expressed by the terms used?"

On a sound construction of the will, I am of opinion that the testator has not affixed any condition to the application of the residue or part of it in the purchase of advowsons or presentations which makes that an application to a charitable purpose, and as the whole of that residue might thus be applied to a purpose not charitable, I am of opinion that the appeal must be allowed.

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LORD DAVEY. My Lords, the primary question in this case is the construction of the testator's will. Reading the will shortly, the testator gave his pure personalty to special trustees upon trust to invest, and with power to apply the income or any portion of the capital in (1.) grants for or towards the purchase of advowsons or presentations; or (2.) in creating or contributing to the erection, improvement, or endowment of churches, chapels, or schools; or (3.) in paying or contributing to the salaries or incomes of rectors, vicars, or incumbents, masters or teachers, but upon certain conditions which I will discuss presently.

There is no doubt that the second and third purposes (which are not numbered in the will, but which I have numbered for convenience of reference) are in themselves charitable, assuming that schools are not schools of a private character; and there is equally little doubt that a trust for making grants for or towards the purchase of advowsons or presentations is not in itself a charitable purpose. The learned judges in the Court of Appeal have, however, thought that they could spell out of the words of the will a charitable purpose in connection with the advowsons or presentations expressed with sufficient definiteness for the Court to give effect to it. What one ought to find is some trust imposed upon the holders of the advowson or presentation when purchased as to the manner in which the right of patronage is to be exercised. The mere purchase or contribution to the purchase of the property in an advowson or right of presentation is in truth a mere change of investment, and the charitable purpose must, in my opinion, be found in the use to be made of the property when purchased. I agree with Rigby L.J. that we must take the whole will together, and see what, as a fair result, is the meaning of the testator, if by that phrase is understood the meaning of the words he has used. I agree, too, with the Lord Justice that the circumstance that the testator makes a separation between the portion of his property which he can by law devote to charity and that which he cannot, and that he appoints special trustees to administer the trusts of the former portion of his property, are matters for serious consideration. But I further agree with the Lord

Justice that you are not, because he has done that, to do violence to the language of any part of the will, or to import words which you do not find there to make the purposes charitable because of those prefatory dispositions which the testator has made. You must construe the words of the will fairly, and if you can find a charitable purpose sufficiently clearly expressed the Court will give effect to it. If you do not find any such definite expression, you are not at liberty to supply it from more or less well-founded speculation of what the testator would probably have wished or intended if his attention had been drawn to the omission. It may be that voluit sed non dixit. Now, apart from the expressed conditions, there is nothing except the prefatory disposition already referred to, and the direction to his general trustees, in case the special trustees named decline to act, to nominate persons who may be depended on to respect and fulfil the testator's wishes. There is no suggestion made of any secret trust. These words, therefore, mean his expressed wishes and do not seem to me to carry the matter any further. I am doubtful whether evidence that the nominated trustees were in fact the then trustees of the well-known Simeon trust is admissible for the purposes of construing the will. It is not pretended that the trusts of the Simeon foundation are imported by implication into the will, and, if so, I do not see the relevance of the evidence. It shews, indeed, what appears from other parts of the will, that the testator was a man of strong Evangelical principles, but it does not assist the Court to arrive at the trusts intended to be imposed upon the advowsons and rights of presentation to be purchased wholly or in part out of the testator's estate. See on this point, *Doe* v. *Copestake*. (1)

I turn now to the expressed conditions, and I assume, for the purposes of this case, that, if applicable to the first purpose, there would be a good charitable trust. The first is that only such churches or chapels shall be subscribed or contributed to wherein the service shall, in the opinion of the special trustees, be conducted in the particular manner prescribed. These words, it is admitted, do not in terms fit or apply to the

(1) (1805) 6 East, 328.

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purchase of advowsons. The learned judges have, however, endeavoured to apply the words to the first purpose. I will not quote again the language of the Master of the Rolls which has already been referred to. I can only say with unfeigned respect for the opinion of that learned judge, that he seems to me to be making a will for the testator and not interpreting the words he has used. In no intelligible sense can the purchase of advowsons be called subscribing or contributing to churches or chapels, and to apply these words to the first purpose seems to be doing violence to the language of the will. The words are directly and plainly applicable to the second purpose, and, in my opinion, to that only. The second and third conditions I need not dwell on because they relate to schools and masters and teachers only. The fourth condition provides that no payment shall be made directly or indirectly to or for the benefit of any rector, vicar, or incumbent, except upon certain conditions, and this is followed by a declaration disqualifying any rector, &c., who shall preach or adopt or follow any doctrines or practices at variance with the testator's views of religion as stated. These provisions, again, are directly and properly applicable to the third purpose of the trust, and cannot be made to fit grants for the purchase of advowsons and presentations. Possibly, if the first purpose were the only purpose of the trust, the Court would, however difficult it might be, endeavour to find a meaning for the words. But where you have other purposes to which the conditions, according to the ordinary construction of the words, are properly and directly applicable it would, in my opinion, be wrong to strain and do violence to the language to make them fit the first purpose.

I quite agree that advowsons may be made the subject of charitable trusts, as was decided by Kay J. in *In re St. Stephen, Coleman Street*. (1) But I am unable to find that the testator has by his will annexed any trust either for a particular charitable purpose or for charitable purposes generally, or indeed any trust whatever, to the advowsons or rights of presentation which he empowers his special trustees to make

(1) 39 Ch. D. 492.

grants for the purchase of. The Attorney-General pointed out that the advowsons and rights of presentation were not intended to be, or, at any rate, might not be, purchased or held by the trustees themselves. The testator, therefore, has left his special trustees free to make grants to other persons, whether trustees or not, in their discretion, or, if the purchasers be trustees, without any definition or limitation of the trusts upon which such persons are to hold the purchased property. The Court is always properly desirous of upholding a testator's will, but after anxious consideration I am unable to say that the will discloses any trust as regards the first purpose which the Court can either execute or control the execution of by the trustees.

What, then, is the law applicable to the case? There are two classes of authorities. On the one hand, there is a long series of cases extending from *Morice* v. *Bishop of Durham* (1), decided by Sir William Grant and Lord Eldon, to *In re Macduff* (2), decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as "charitable or benevolent," or "charitable or philanthropic," or "charitable or pious" purposes), or where the description includes purposes which may or may not be charitable (such as "undertakings of public utility"), and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Vezey* v. *Jamson* (3) the trust was to dispose of the residue in such charitable or public purposes as the laws of the land would admit, or to any persons as the trustees in their discretion should think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir John Leach said: "The testator has not fixed upon any part of this property a trust for a charitable use; I cannot therefore devote any part of it to charity. . . . . The necessary consequence is, that the purposes of the trust being so general and undefined that they cannot

(1) 9 Ves. 399; 10 Ves. 321. (2) [1896] 2 Ch. 451.
(3) 1 S. & S. 69.

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be executed by this Court, they must fail altogether, and the next of kin become entitled to the property."

On the other hand, it has been decided in cases such as *Attorney-General* v. *Doyley* (1) and *Salusbury* v. *Denton* (2) that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail; but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally.

My Lords, I have come to the conclusion that the present case falls within the first class of cases. As Sir William Grant says, in *Morice* v. *Bishop of Durham* (3): "The question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it." The answer to that question in the present case can only be that there is no such obligation. On the other hand, the other purposes to which conceivably the trustees may apply the whole fund in their discretion are not described with sufficient definiteness for the Court to attach any trust upon them.

A third class of cases was relied on by the Attorney-General, of which *Sinnett* v. *Herbert* (4) and *In re Douglas, Obert* v. *Barrow* (5), are examples, in which there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the trust is good, and the Court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable. But, in my opinion, those cases have no application to that before your Lordships, because, as I have already said, I think that there is not here any general trust for charity binding the whole fund.

The result is that, in my opinion, the order of the Court of Appeal should be discharged, except so far as it relates to costs, and that of Romer J. restored. The appellants here will have

(1) (1735) 4 Vin. Abr. 485 7 Ves. 58, n.
(2) 3 K. & J. 529.
(3) 9 Ves. 399; 10 Ves. 321.
(4) L. R. 7 Ch. 232.
(5) 35 Ch. D. 472.

their costs out of the estate. The respondent, the executor, must also have his costs as between solicitor and client out of the estate.

Sir R. E. Webster A.-G. submitted that the Attorney-General was entitled to costs out of the estate.

After some discussion,

EARL OF HALSBURY L.C. Considering the fact that the Attorney-General was made a defendant, and in a public capacity as the guardian of a large charitable fund, as this was supposed to be, and that he had the judgment of the Court of Appeal which asserted that it was a charity, I think it would have been contrary to his duty, as Attorney-General, if he had not appeared in support of the judgment of the Court of Appeal which pronounced this to be a charity. I think the circumstance also that it is a very large estate ought not to be left out of account. For these reasons I am of opinion that he ought to have his costs; but I wish to guard myself against saying that it is to be established, as an absolute precedent, that in all cases the Attorney-General ought to have his costs.

LORDS SHAND and DAVEY concurred.

Order of the Court of Appeal appealed from reversed except as to costs; order of Romer J. restored. (1)

Lords' Journals, May 18, 1899.

Solicitors for appellants: *Hollams, Sons, Coward & Hawksley.*
Solicitor for Attorney-General: *Solicitor to the Treasury.*
Solicitors for respondent Hood: *West, King, Adams & Co.*

(1) The order was not drawn up when this report went to press.

[HOUSE OF LORDS.]

H. L. (Sc.) 1899 *April* 27.

THE CELLULAR CLOTHING COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MAXTON & MURRAY . . . . . RESPONDENTS.

Trade Name—Descriptive Name—Interdict.

The appellants, an English company, claimed to have invented, or at least to have put upon the market, a fabric suitable for shirting and underwear woven in a particular manner; and alleged that they had for the last ten years described this fabric in their advertisements as made in a certain way; and that they had marked it and invoiced it under the name of "cellular cloth" largely in England and, to some extent, in Scotland. The name had not been registered. The respondents were a wholesale firm in Edinburgh who sold cotton and woollen goods which they had recently described as "cellular":—

Held, affirming the decision of the First Division of the Court of Session, that the appellants were not entitled to relief on the grounds—(1.) that the word "cellular" was an ordinary English word which appropriately and conveniently described the cloth of which the goods sold by the respondents were manufactured; and (2.) that the term had not been proved to have acquired a secondary or special meaning so as to denote only the goods of the appellants.

Reddaway v. *Banham*, [1896] A. C. 199, distinguished.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The following statement of the facts has been mainly taken from the judgment of the Lord Ordinary (Lord Kyllachy).

The appellants were an English company, registered under the name of the Cellular Clothing Company, and claimed to have invented, or at least to have put on the market, a certain fabric suitable for shirtings and underwear, and woven in a particular manner which they described in their published advertisements. They had given to this fabric the name of "cellular cloth," and they had undoubtedly for the last ten years advertised, sold, marked, and invoiced it under that

(1) (1898) 25 R. 1098.

name, largely in England, and also to some extent in Scotland.

There was no question of patent. The appellants had a registered trade-mark, which they partially used, of which the word "aertex" was the essential part. But the word "cellular" was never registered by itself or as part of the trade-mark.

The respondents were a firm in Edinburgh who were wholesale dealers in cotton and woollen goods, having a fairly extensive business in Edinburgh and over Scotland. The allegations made against them by the appellants was that "in or about February or March, 1897, they in the course of their trade systematically used the word 'cellular' to designate and classify goods which were not of the appellants' manufacture, and that in such manner as to make purchasers believe that said goods were the appellants' goods." And that they "did and are doing so in the knowledge, as is averred, that the trade and the public understand by 'cellular' goods goods manufactured or supplied by the appellants."

On these allegations the appellants brought an action against the respondents to have the respondents interdicted from using the name "cellular" by itself or in combination or in conjunction with any word or words describing or distinguishing or in connection with cloth or clothing so as to denote or indicate cloth or clothing not being cloth or clothing made or supplied by the appellants, and from selling or offering for sale or causing to be sold or offered for sale cloth or clothing not of the appellants' manufacture made or supplied by the appellants under the name, word, or term "cellular," and from using trade labels, window tickets, wrappers, invoices, circulars, notices, or advertisements of any kind with the said name, word, or term "cellular" by itself or in conjunction with any other word or words thereon in connection with the manufacture or sale of cloth or clothing, bandages, sheets, curtains, shirts, or underwear not made or supplied by the appellants or upon or attached to any such goods or class of goods not made or supplied by the appellants, and from publishing or issuing or causing to be published or issued circulars, notices, or advertisements of any kind containing or using the word

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"cellular" in such a way as to denote goods not of the appellants' manufacture, and from using said word in any way calculated to lead the public to infer or believe that the respondents are entitled to sell goods under the name "cellular" which are not made or supplied by the appellants, or that the goods which they so sell are made or supplied by the appellants, and also from otherwise in any way infringing the appellants' right to the name, word, or term "cellular" by using it in any way so as to designate any goods not made or supplied by the appellants.

The respondents denied the appellants' exclusive right to the name "cellular," which they alleged was descriptive of a cloth made in a certain way. They admitted having sent a pattern-book to their customers containing a sample of this kind of cloth, not of appellants' make, described as "cellular"; but they alleged that in describing their said patterns they had only made use of English words in common use.

The respondent, Mr. Maxton, stated in his evidence—(1.) that until challenged by the appellants' solicitors he had never heard of the appellants' company; (2.) that, on the other hand, he had for some years been acquainted with cellular cloth as a description of cloth in the market, which had been repeatedly offered him under that name by a Scottish manufacturer; (3.) that he only took up the fabric in 1897, and his whole transactions in it have been of the value of less than 5*l*. He stated also that all the persons to whom he sold were retail shopkeepers who perfectly understood that the goods were his own make—that is to say, were made by or for him; and that altogether he had so little desire or interest to push the article, or to use in connection with it any particular name, that when challenged by the pursuers he at first offered, to save trouble, to give an undertaking to stop the use of the word "cellular" in any form. He further stated that only when, the appellants' solicitors having claimed a sum for expenses, he was led to consult his agent, did he learn for the first time the true nature of the appellants' claim, and make up his mind to resist what he considered the unjust pretension of the appellants. The respondents also adduced evidence to shew that

large traders had frequently used the term "cellular," and witnesses declared they had heard it used to describe cloth of this character for years before they heard of the appellants' company. The appellants were granted an inspection of the respondents' books, and an extract produced contains entries of six sales of cellular cloth. The purchasers were all examined. John Jelly, the first in order, said: "In giving that order, I did not expect to be supplied with the make of cloth of the Cellular Clothing Company. I did not intend to order that, nor did I expect to get it. If I had wished to get the Cellular Company's goods, I would not have gone to Messrs. Maxton & Murray for them, because I knew they were not the Cellular Clothing Company's agents." With one exception, the other purchasers also said that they did not, in making their purchases, expect to get the goods of the Cellular Clothing Company, or understand that they were getting these goods.

The remaining purchaser, Brown, being shewn a pattern-book, said: "It was admittedly a book shewing goods of the respondents' manufacture, and I noticed that they put the word 'cellular' at the top of one of the pages of the book. Up to that time I had never heard of any goods being recommended as cellular except the product of the Cellular Clothing Company. I accordingly communicated with the Cellular Clothing Company, and they asked me to send the pattern-book which I had got, and I did so." In cross-examination this witness explained that he was sole agent for the appellants in Kelso, and he admitted that, after having done this, he had asked for financial assistance from the appellants, but did not get it.

The appellants' first original advertisement in the *Lancet* and other journals, dated June, 1888, was as follows:—

"Cellular Cloth and Clothing.

"The principle involved in this material for both outer and under-clothing is that it is cellular in structure, so that advantage is taken of the non-conducting power of the air (one of the best non-conducting substances known) to make it

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a covering for the body equally fitted for the cold of winter and the warmth of summer.

"The cloth combines lightness and durableness with the largest possible air surface. It has also the great advantages of being exceedingly cheap and of washing without shrinking.

"Exhalations from the body pass readily through this clothing, and cleanliness of the surface of the body is much promoted by its use. In this respect it is very superior to flannel, wool, merino, or any other substances which from closeness of texture retain the cutaneous exhalations.

"The cellular cloth is well adapted to many medical and surgical purposes. It is already in use for bandages, and in some hospitals it is used for sheeting, pillows, and night garments.

"To this cellular fabric a medal was awarded in 1887, by the Sanitary Institute of Great Britain, and several medical men who have used it have accorded a willing testimony to its value.

"The cellular clothing can be obtained from any respectable retailer, and wholesale only from

"The Cellular Clothing Company (Lim.), 75, Aldermanbury, London, E.C."

And in their advertised price-list for 1898 the appellants thus described their cloth: "On the other hand, cellular cloth is so woven that it consists of an infinite number of small cells, each cell having at its back fine threads to prevent too quick radiation, but not interfering with the escape of moisture and other substances. . . . . It has now been abundantly proved that cotton cloth made on the cellular principle is almost perfection, and is distinctly preferable, &c., &c., to any other form of underwear for general use."

As to whether the name had become descriptive of the appellants' goods, they adduced a number of witnesses engaged in the soft goods trade, who stated generally what they understood, and what they understood the trade to understand, by the words "cellular cloth." Some of these witnesses were the appellants' agents, or were in some way connected with them.

Such evidence was met by counter-evidence. The appellants also proved certain facts, and in particular these: (1.) that although prior to 1888 goods were in the market to which the adjective cellular might without violence have been applied, the word was not in fact so applied, but was first applied by the appellants in or about that year; (2.) that the appellants have since 1888 used every effort to appropriate the word, or to associate it with their goods, advertising it liberally if not profusely, and claiming the word as theirs by every means in their power; (3.) that in particular they have by threats of legal proceedings compelled or induced a number of persons—mostly retail shopkeepers throughout the country, but in at least two cases companies with a board of directors—to grant undertakings to desist from the use of the name; and (4.) that, as the consequence of these proceedings or for other reasons, various firms have, in selling cloth closely resembling the appellants', adopted names of their own more distinctive.

In short, the case which the appellants made against the present respondents was a case of indirect misrepresentation, i.e., misrepresentation to the general public through the retail shopkeepers. The appellants further relied on the issue by the respondents of the pattern-book referred to above.

The Lord Ordinary on March 12, 1898, refused an interdict and dismissed the action with costs, and his judgment was affirmed by the First Division of the Court of Session on July 12, 1898. (1)

March 2, 3; April 25, 27. *A. Graham Murray, L.A.*, and *John Cutler, Q.C.* (with them *J. C. Watt*), (the first and third of the Scottish Bar), for the appellants. The word "cellular" is not a registered trade-mark; therefore the appellants concede that the onus lies on them to shew that the respondents have attempted to sell other persons' goods as the appellants' goods, and this it is submitted is made out by the evidence. Secondly, although the term is descriptive, the onus on the appellants to shew that the term has acquired a secondary meaning as denoting their goods only has been discharged. There has

(1) 25 R. 1098.

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always been cloth in the market which was of a cellular character, but no one thought of giving it that name until the appellants so called it years ago, when, for the first time, cloth of that peculiar configuration was introduced by them to the market at a great expense for advertisement, and with great success. Nor is there a trace of the word ever being used in connection with cloth until after the appellants' cloth had established a reputation and others had begun to imitate it. Again, where others have tried to use the word "cellular" in connection with the sale of cloth they have been forced by injunction to desist. The question is, What is the meaning of the words "cellular cloth" in the market? See opinions in *Reddaway* v. *Banham* (1) and *Reddaway* v. *Bentham Hemp Spinning Co.* (2) If the appellants can prove—and they maintained they have proved—that the words "cellular cloth" in the market means their goods, then they are entitled to an injunction against any method of dealing which is likely in the outcome to pass off on any portion of the public the goods of others as the goods of the appellants; and that quite apart from any scheme of deception on the part of those complained against, for it is not necessary to prove an intention to mislead, or that any one has been misled: *Singer Manufacturing Co.* v. *Loog* (3); see also *Millington* v. *Fox* (4); *Ford* v. *Foster* (5); *Singer Manufacturing Co.* v. *James Spence & Co.* (6)

Shaw, *Q.C.*, and *T. B. Morison* (both of the Scottish Bar), for the respondents, were not called upon.

EARL OF HALSBURY L.C. My Lords, in this case it appears to me that the initial proposition which has been put forward by the learned counsel is perfectly accurate, namely, that this is a question of fact; and if it is a question of fact it is, to my mind at all events, one that admits of very easy solution.

I agree with almost every word of the judgment of the Lord Ordinary (7); and, with the exception of the initial proposition,

(1) [1896] A. C. 199.
(2) [1892] 2 Q. B. 639.
(3) (1880) 18 Ch. D. 395, 417.
(4) (1838) 3 My. & Cr. 338, 352.
(5) (1872) L. R. 7 Ch. 611.
(6) (1893) 10 R. P. O. 297.
(7) Lord Kyllachy, (1898) 25 R. 1098–1100.

I agree with almost every word in the judgment of the Inner House. I confess I am a little puzzled to know how the initial proposition of the Inner House is reconcilable with what follows. The learned judges there say they felt a difficulty, and I think they are quite right in saying so, as to "the possible subsistence in trade use of the primary meaning of the word 'cellular' as denoting a particular class of goods, alongside of the secondary meaning which the pursuers seek to affix to it as denoting goods manufactured or sold by themselves." Then the learned judges go on with great accuracy, I think, to say: "An invented name has either no meaning at all, or no meaning in relation to the goods which it denotes; and it has been held that a trader who selects such a name for the purpose of distinguishing his goods from those of other traders is entitled to be protected in the use of the sign which he has chosen. In such a case the mere fact of the use of the arbitrary sign by a rival trader raises a presumption of a design to pass off his goods under false colours which it is not easy to displace." Every word of that I concur with. Then the learned judge goes on to say, speaking of the evidence: "I think it must be admitted that the word 'cellular' has not lost its descriptive signification according to the use of the cloth trade; in other words, that the primary meaning has not been displaced by the secondary meaning which the pursuers allege, and have in part proved." Further on he says: "In the balanced state of the evidence as to secondary meaning, I think it may be affirmed that there is no presumption against the defenders from the mere use of the adjective 'cellular' as a term descriptive of goods which they offer for sale. That being so, we are referred back to the principle on which this innominate right depends; which is, that a trader is not entitled to represent that the goods which he sells are the goods of a different trader, to his injury."

I must say for myself I concur in every word of those passages which I have referred to in the judgment of the Inner House, and the only thing that, as I have said, puzzles me is how, on that reasoning and under those circumstances, the Inner House can have pledged itself to the proposition that,

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but for certain circumstances not very clearly defined, they would have been in favour of the pursuers on the initial question. That is the whole question, the proposition being, as is rightly pointed out, that no man has a right to sell his goods as though they were the goods of another man. That is the proposition, and the passages I have read seem to me very clearly to dispose of the proposition that in the particular case here dealt with one man is selling his goods as the goods of another. But, on the other hand, it has been pointed out, with great force and precision, that all the circumstances proved are compatible with the view that the word has retained its natural and proper signification. I do not think it is a matter that demands very copious exposition, because, as I have said, it is a question of fact. And I should like to point out here, that as we are dealing with a question of fact and not of principle, no previous case can be an authority. It being a question of fact, each case must depend upon the facts applicable to that case alone. A principle may be deduced from a previous decision; but there is no dispute about principle in this case, and, therefore, I am unable to understand what virtue there is in referring to other cases in which this principle has been affirmed.

The only observation that I wish to make upon that part of the argument is that it seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. That seems to me to be inconsistent with a decision given something like sixty years ago by Lord Cottenham, who goes out of his way to say very emphatically that that is not at all necessary in order to constitute a right to claim protection against the unlawful use of words or things—I say things, because it is to be observed that not only words but things, such as the nature of the wrapper, the mode in which the goods are made up, and so on, may go to make up a false representation; but it is not necessary to establish fraudulent intention in order to claim the intervention of the Court. Lord Cottenham says in that case (*Millington* v. *Fox* (1)): "I see no reason to believe that

(1) 3 My. & Cr. 338, 352.

there has in this case been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer, and there is no evidence to shew that the defendants were even aware of the existence of the plaintiffs, as a company manufacturing steel; for although there is no evidence to shew that the terms 'Crowley' and 'Crowley Millington' were merely technical terms, yet there is sufficient to shew that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and therefore I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual." That, my Lords, I believe to be the law. It was the law then, and it has not been qualified or altered by the fact that the Trade Marks Act has since been passed, which gives a feasible and perfectly facile mode of remedy in cases in which trade-marks apply.

I only wish to say with reference to the case of *Reddaway* v. *Banham* (1) (the Camel-hair Belting Case), that some words of mine appear to have been made use of in a way they were never intended to be applied. It is true in that particular case there was the intention to deceive, and there was a fraudulent design which, as Lord Cottenham pointed out, was not at all necessary for the purpose of establishing a right to relief. What I did point out in that case was this: that a man in the trade, whose acquaintance with the trade terms as against him must be assumed, appeared to shew by what he had written that the mere use of the particular words selected, namely, "camel's-hair belting," would be understood in the trade to mean the plaintiffs' manufacture. Of course that letter proved two things: it proved the fraudulent design which perhaps would have been enough by itself, but it also proved (and it was that point I emphasised in the judgment I gave in that case) conclusively as against him, that in the trade those words had been so accepted and known as indicating the plaintiffs'

(1) [1896] A. C. 199, 204, 205.

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manufacture, that the mere use of them would enable him to take away the plaintiffs' orders. I certainly thought I had guarded myself sufficiently by speaking of it as a matter, not of law, but of fact, and saying that that was evidence which, if I had been a juryman, would have convinced me of the effect of the use of the words in question as applicable to the nomenclature of the trade.

There has not been any question, nor can there be any question, as to what the state of the law is. It is laid down in *Burgess's Case* (1), the Anchovy Sauce Case, with great precision. The simple proposition is this: that one man is not entitled to sell his goods under such circumstances, by the name, or the packet, or the mode of making up the article, or in such a way as to induce the public to believe that they are the manufacture of some one else. The proposition that has to be made out is that something amounting to this has been done by the defendant, and if that proposition is made out the right to relief exists.

In this particular case what strikes me is this, as the Inner House have distinctly and correctly pointed out in the passages from their judgment that have been read, where you are dealing with a name which is properly descriptive of the article the burden is very great to shew that by reason of your using that name descriptive of the article you are selling, you are affecting to sell the goods of somebody else. Certainly the Camel-hair Belting Case may be an example of what, under ordinary circumstances, it would be very difficult to establish; but it was established there. But here the word "cellular" as a description is applicable; some of the documents and all the advertisements point out how appropriate and accurate that mode of description is to the article sold. It cannot be denied, therefore, under those circumstances, that it was for the appellants to establish, if they could, that an ordinary word in the English language, properly applicable to the subject-matter of the sale, was one which had so acquired a technical and secondary meaning, differing from its natural meaning, that it

(1) (1853) 3 D. M. & G. 896.

could be excluded from the use of every one else. That is the proposition the pursuers had to make out.

My Lords, I do not propose to go through the evidence. I am satisfied with what has been said about it by the two Courts before whom this question has come. It seems to me that the plaintiffs have failed in establishing this initial fact, and if they have failed in that they have failed altogether, because that cuts out the root of a claim to a remedy. Therefore, it appears to me that the ultimate judgment of both Courts was right, and I move your Lordships that this appeal be dismissed with costs.

LORD WATSON. This case has been treated in argument with all the care and anxiety that seem to be required where counsel have to deal with a question touching trade-marks; but at the same time I must say that, from the beginning to the end of the comments which have been made upon the evidence, I have had no difficulty in following and in entirely concurring with the view of the facts which has been suggested in the judgment of the Lord Ordinary.

It is not necessary for me to dwell upon the case after what has been said by the Lord Chancellor, but I must observe that the word "cellular," in the use of which the alleged infringement of the pursuers' right consisted, is an ordinary English term. It is not only an English term, but it is a word which has no necessary connection with, and does not in itself necessarily suggest, the existence of a Cellular Cloth Company. And it is a term which conveniently enough and appropriately enough describes the cloth of which the articles of dress sold by the respondents are manufactured. I have sought in vain in the evidence for any indication, in the first place, that there was deceit or fraud committed by the use of the term "cellular cloth" which has led anybody, even a retail trader, or a retail trader's customer, to suppose for one moment that he was getting the Cellular Company's cloth and not cloth manufactured in Scotland by another manufacturer. In the second place, I see no reason to suppose that there was in the term itself, or in the way in which it

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was presented to the public by the respondents, any opportunity given, such as the law would disapprove of, for a retail trader to commit a fraud upon the customers to whom he sells.

Under these circumstances, I think it is clear that this appeal has entirely failed, and that the judgment of the Court below ought to be affirmed.

LORD SHAND. Notwithstanding the anxious and able argument presented on the part of the appellants, I am clearly of opinion that the Court of Session has come to a sound result, and that this appeal ought to be dismissed. For my part, I entirely adopt the clear and valuable judgment of the Lord Ordinary, Lord Kyllachy, and I rely on the grounds of judgment which his Lordship has so well stated.

I must, however, add that I do not participate in even the slight hesitation which his Lordship has expressed as to whether the word "cellular" may not, to a certain limited extent, partake of the character of a fancy name. I am of opinion that the word is purely descriptive, and was so used by the appellants. The cloth advertised and sold by them has been and is called "cellular" because it is cloth the texture of which is made up of cells. The term "cellular" is used in its ordinary signification, and it was and is used because it aptly and properly describes the goods or material sold. It is unnecessary to elaborate the point, for I think it was scarcely disputed by the learned counsel for the appellants. But I find the clearest evidence of its being simply a descriptive term in the advertisements and price-lists, which the appellants themselves circulated. In the price-lists they expressly say, "Cellular cloth is so woven that it consists of an infinite number of small cells." And in the advertisements, as the Lord Chancellor observed, the appellants have made it quite clear that they were merely adopting this word as properly describing their goods. They have adopted a word which is in common use, and they have used it in accordance with its ordinary signification in the English language.

There is a vital distinction in cases of this class between

invented or fancy words or names, or the names of individuals such as "Crowley" or "Crowley Millington," attached by a manufacturer to his goods and stamped on the articles manufactured, and words or names which are simply descriptive of the article manufactured or sold. The idea of an invented or fancy word used as a name is that it has no relation, and at least no direct relation, to the character or quality of the goods which are to be sold under that name. There is no room whatever for what may be called a secondary meaning in regard to such words, as the Lord Advocate pointed out in the course of his argument. The word used, and attached to the manufacture, being an invented or fancy name and not descriptive, it follows that, if any other person proceeds to use that name in the sale of his goods, it is almost if not altogether impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other manufacturer. A person invents or applies the term "Eureka" as the name of a shirt in his sales. If you buy a "Eureka" shirt, that seems at once to mean that you are buying a shirt made by the particular maker who is selling shirts under that fancy name. The public come to adopt the word "Eureka" as applicable to the manufacture of the particular person who began to use it and as denoting the article he is selling, and if another person employs the word in the sale of the same or a similar article, it seems to follow that he is acting in direct violation of the law that no one in selling his goods shall make such representations as will enable him to pass them off as the goods of another, so as to get the benefit of that other's reputation.

A totally different principle must apply in the case of goods which are sold under a merely descriptive name. If a person employing a word or term of well-known signification and in ordinary use—though he is not able to obtain a patent for his manufacture, and although he has not got the protection of a registered trade-mark for the goods he is proposing to sell—is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of this descriptive term, he

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would really acquire a right much more valuable than either a patent or a trade-mark; for he and his successors in business would gain the exclusive right, not for a limited time as in the case of a patent, but for all time coming, to use the word as applicable to goods which others may be desirous of manufacturing and are entitled to manufacture and sell as much as he is. That being so, it appears to me that the utmost difficulty should be put in the way of any one who seeks to adopt and use exclusively as his own a merely descriptive term.

The case on which the appellants have chiefly relied is that of the Camel-hair Belting, the case of Reddaway. Of that case I shall only say, that it no doubt shews it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive use or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for any one to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only—and, indeed, were it not for the decision in *Reddaway's Case* (1), I should say this should be made altogether impossible.

It is true the question in issue in cases of this class may generally be broadly stated as: Did the defendants by their representations seek to induce purchasers to acquire their goods under the false belief that these goods were of the plaintiffs' manufacture? If it can be shewn that representations to the effect that the goods were manufactured by the plaintiffs be made directly or by implication, by the language used, the plaintiffs would of course be entitled to a remedy. But where the plaintiffs' proof shews that the only representation by the defendants consists in the use of a term or terms which aptly and correctly describe the goods offered for sale, as in the present case, it must be a condition of the plaintiffs' success

(1) [1896] A. C. 199.

that they shall prove that these terms no longer mean what they say—or no longer mean only what they say—but have acquired the secondary and further meaning that the particular goods are goods made by the plaintiffs, and, as I have already indicated, it is in my view difficult to conceive cases in which the facts will come up to this. Unless that be proved, there is no room for a charge of violation of any right, or indeed of a charge of fraud—for the defendants are only exercising the right which they possess as much as the plaintiffs do, and which every one has, to employ words in ordinary use which are an apt and proper description of the goods for sale.

The Lord Ordinary has made this observation in his judgment: "I do not myself remember a case in which the use of a merely descriptive name has been interdicted as deceptive, unless in circumstances which truly involved fraud on the part of the user." The appellants' counsel were unable, though invited by me, to cite any case that runs counter to that observation, which I believe to be sound. In the case of Reddaway it was held there was fraud. The person who sold the goods (the camel-hair belting) had expressly said that he would be enabled by using that term to sell his goods as the goods of the plaintiffs, and if the term "camel-hair belting" had really come to mean the plaintiffs' belting in the trade and with the public, and the defendant knew this, that was a case of fraud. In the case of Reddaway, I understand it was held that the words had acquired the secondary meaning alleged, and that the defendant's knowledge of this was important evidence on that point.

The case of *Millington* v. *Fox* (1) was not one of the use of a properly descriptive name, but rather a case of the same class as those in which an invented or fancy name is used. "Crowley" and "Crowley Millington" were the names used, and these names clearly marked the plaintiffs' goods as being of their manufacture. No secondary meaning was acquired or could exist, and Lord Cottenham's observations must be read as referring to such cases and not to a case in which a merely descriptive word is used.

(1) 3 My. & Cr. 338.

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On the facts of this case I entirely agree with the Lord Ordinary; I think his Lordship is sound in the view he takes that this is to be tried as a question affecting the trade in Scotland; and even if it had been proved that in England the word "cellular" had acquired the secondary signification claimed, still, if it were not proved that in Scotland the same signification was attached to it by the trade and the public, I should say the decision ought to be different from what it might perhaps be in England. Supposing a plaintiff were able to prove that in a number of the southern counties of England his goods had been sold under that name, and if it could therefore be held that in these counties by its universal use the word had acquired a secondary signification, that would surely never entitle the plaintiff to have an injunction in every part of England. My Lords, I say the same as between England and Scotland.

As to the proof itself, I have only to say this: it must not be forgotten that it is on the pursuers that the onus lies in seeking to appropriate as their own a descriptive term such as the word "cellular." It is for the pursuers to shew that in Scotland the term has acquired in the trade and with the public the signification they ask to attach to it. We have a large body of evidence for the defenders to the effect that nothing of the kind has occurred. We have the pregnant fact that the defender had never heard of the pursuers nor of their particular cellular cloth, and that the persons from whom he bought and those to whom he sold were in the same position; and there were a good many other witnesses to the same effect. Taking the evidence as a whole, and keeping in view that the onus is on the pursuers to establish by proof that a special secondary meaning has been attached to the word "cellular," I am clearly of opinion that they have failed to make out their case.

My Lords, I have spoken at greater length than I intended; but I have felt that the case was one of importance, and so I have been led fully to express the views I hold.

On the grounds I have stated, I am of opinion that this appeal fails.

LORD DAVEY. If the older decisions in England of the Court of Chancery were examined, I think it would be found that descriptive words, or common words, expressive only of the quality of goods, would not have been by that Court considered entitled to any protection. But the facts and the law are frequently mixed up in the judgments of the Court of Chancery, and it may be that in the class of judgments to which I refer all that was pointed at was the extreme difficulty of proving that common or descriptive words have acquired a secondary sense and become significant of the plaintiffs' goods as distinguished from those of other manufacturers. And I certainly cannot find that any such abstract principle has ever been adopted in the Courts of Scotland. Therefore, I take the logical foundation of this branch of the law to be that which was stated by Turner L.J. in his judgment in *Burgess* v. *Burgess* (1), which has frequently been referred to, and the terms of which are present to your Lordships' minds. Shortly summed up, it is that a man shall not by misrepresentation pass off his own goods as those of his neighbour.

But there are two observations which must be made: one is that a man who takes upon himself to prove that words, which are merely descriptive or expressive of the quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and, indeed, a burden which it is not impossible, but at the same time extremely difficult, to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but what has been compendiously called a "fancy" word.

The other observation which occurs to me is this: that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of

(1) 3 D. M. & G. 896, 905.

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that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to except the plaintiff. And on this point I adopt what was said in felicitous language by Fry L.J. in *Siegert* v. *Findlater*. (1) That is, my Lords, a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course, a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article: all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may primâ facie use the name by which the article is known in the market.

In the present case I hold with the learned judges in the Court below and with your Lordships that there are certain facts which are beyond controversy. I take it as regards the defenders, the present respondents, that it is established that they have done nothing whatever to represent their goods to be the goods of the pursuers unless the use of the word "cellular" without the addition of any other term, the simple use of the word "cellular," is sufficient for that purpose. Indeed, I take it to be established by the evidence that the defender had not

(1) (1878) 7 Ch. D. 801, at p. 813.

even heard of the pursuers' company until they were threatened with the present action.

I will assume for the purpose of this case that the pursuers, as Mr. Haslam says in his evidence, first introduced the article, the cloth which is manufactured in this particular cellular mode (I am obliged to use the word "cellular" because I know of no other word to express it); and they first attached the name "cellular" to the cloth manufactured in that particular mode—whether it is so is not quite clear from the evidence, but I assume that Mr. Haslam's statement in that respect is correct. I think it is established by the evidence that the word "cellular" is beyond all question of a descriptive character. I need only refer to the advertisements issued by the pursuers themselves for that purpose. I shall refer to those advertisements again, but they do contain a most careful and, it appears to me, clear and accurate description of the cellular mode in which the cloth is made, and they shew, in my opinion beyond all controversy, that the word "cellular" is not only descriptive, but is the most appropriate term which can be used for the purpose of describing cloth manufactured in the mode in which the pursuers manufacture their goods.

Then, that being so, what is the evidence upon which the pursuers rely for the purpose of shewing that the word has acquired a secondary meaning, so that the mere simple use of the word is alone evidence of a misrepresentation by the defenders? First we have the advertisements. Now, my Lords, I am not going to delay you by reading the advertisements; they have been referred to in the course of the argument, and I do not think I should be justified in reading them again—they are present to your Lordships' minds, so that it is unnecessary that I should do so. But, my Lords, I make this observation upon them, and I think it is well founded, that the advertisements which were put in, although beyond all question they contain as I have already said a very clear statement of the reasons why the cloth is called "cellular," and a very clear statement of the kind of cloth which is meant by the use of the word "cellular," they do not according to

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my conception draw attention to the fact or in any way lead the readers of those documents to suppose either that the cellular cloth was the sole manufacture of the pursuers, or that the word "cellular" denoted cloth manufactured by them alone, as distinguished from cloth of a similar description made by other manufacturers.

My Lords, the second class of proof is that of witnesses who say in effect this (I will take one of the best and I think one of the earliest witnesses—Mr. Henley): "If I heard anybody in the trade speak of 'cellular goods,' I would understand that he meant the product of the Cellular Clothing Company." Well, my Lords, so long as the Cellular Clothing Company were the only company who were making cellular goods that would not be astonishing, and so long as they retain the monopoly no doubt that might be the case; but, as I have already said in speaking of the proposition generally, it is in fact very slender evidence upon which to found the superstructure which the pursuers' counsel endeavoured to erect upon it, and indeed, unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods, there is no subject of comparison.

The third class of evidence consists of cases in which the pursuers have induced certain persons to submit to injunctions and pay costs. That does not appear to me to be very strong evidence in favour of the pursuers. Of course, a shop-keeper or a person in that position would hesitate a long time before he incurred the expense, which in the case of a trade-mark or in a patent case is not slight, of defending an action of this character. Probably the value to him of the trade he would lose would not in any way compensate for the risk he would incur. Therefore, as evidence of the fact I do not attach much importance to those cases. On the other hand, I am bound to say that the Lord Advocate's observation appears to me to have been well founded that, of course, persons, if they wish to protect rights to which they conceive themselves to be entitled, are bound to be prompt and vigilant in defending those rights when they appear to be infringed.

My Lords, I will not detain your Lordships any longer. I might perhaps have contented myself with saying that I agree with the judgment of the Lord Ordinary, and in substance with the judgment delivered by Lord M'Laren on behalf of the learned judges of the Inner House, subject to the observation which has been made by the noble and learned Lord on the Woolsack that the expression of opinion with regard to the evidence at the beginning of the judgment does not seem to be altogether consistent with the grounds upon which the learned judge finally finds in favour of the defenders.

I agree in the judgment proposed.

Appeal dismissed with costs.

Lords' Journals, April 27, 1899.

Agents for appellants: *Ernest Salaman, Fort & Co., for Clarke & Macdonald, S.S.C., Edinburgh.*

Agents for respondents: *Anderson & Sons, for P. Morison & Son, Edinburgh.*

H. L. (D.)
1899
May 16.

[HOUSE OF LORDS.]

JONES' DIVORCE BILL.

Divorce Bill—Evidence taken in India.

Evidence taken in India on commission, and received and acted on by the Queen's Bench Division of the High Court of Justice in Ireland, admitted to be used on the second reading of an Irish divorce bill.

Bill to dissolve the marriage of Charlotte Jane Jones of St. Helen's, Dalkey, County Dublin, Ireland, with Robert Colvill Jones of Irish domicil.

The marriage took place at St. James's Church, Calcutta, India, on September 30, 1888, Robert Colvill Jones being then in the temporary employ of King, Hamilton & Co., tea planters at Calcutta.

There was issue of the marriage a daughter. The parties lived together at Calcutta and at Dibrugarh, India. Shortly after the marriage, until the petitioner, on November 20, 1890, left her husband, he was frequently guilty of acts of gross cruelty. On November 20 a deed of separation was executed which set out that the separation was caused purely by the cruelty of the husband; and the husband signed this deed, and his signature was verified to the House. By this deed the husband covenanted to pay the petitioner Rs.125 a month, but had never paid a single rupee towards the petitioner's or his child's support. In 1896 it came to the petitioner's knowledge that her husband had been guilty of adultery in India with one Jagesvari, alias Bigili, a native woman, and that he had kept this woman as his mistress for three or four years. As soon as the petitioner could collect sufficient funds, namely, on August 2, 1898, she instituted proceedings in the Queen's Bench Division—Matrimonial Branch—of the High Court of Justice in Ireland for a divorce a mensa et thoro, and cited her husband. His abode not being discoverable, substituted service was ordered to be made upon the husband's cousin, who

admitted he knew where the husband was living. No appearance was made for the husband; and on April 18, 1899, the said Court in Ireland found Robert Colvill Jones guilty of adultery and cruelty, and a decree of divorce from bed and board was made.

FIRST READING.

May 12. *Lewis Coward*, for the petitioner, applied, first, that substituted service of a copy of the bill be made upon Robert Colvill Jones and Ffolliott Jones, cousins of Robert Colvill Jones the husband of the petitioner; secondly, that the depositions of A. M. Harry, Jagesvari, alias Bigili, and Anupa, taken on commission in India in pursuance of orders of the Queen's Bench Division (1) of the High Court of Justice in Ireland, dated January 16 and March 29, 1899, be received in evidence on the second reading of the bill; or, in the alternative, the examination of the said witnesses be taken in India, and that a proper warrant or warrants be issued for the purpose.

If the first alternative were granted it would save great expense, and further if the evidence were again taken in India it would be merely a repetition of the depositions: see *Sinclair's Divorce Bill.* (2)

THE HOUSE (Earl of Halsbury L.C., Lords Watson, Macnaghten, Morris, and Shand) allowed the evidence taken on deposition to be tendered and received on the Second Reading, the petitioner taking the risk if it were held not to be sufficient; and also ordered substituted service as prayed.

SECOND READING.

May 16. *Lewis Coward*, for the petitioner, stated the above facts, read the separation deed, and proved the husband's signature thereto, and then read the depositions taken in India, stating further that, since the last meeting of the House, Sir

(1) See 60 & 61 Vict. c. 66, s. 5, under which the Probate and Matrimonial Division of the High Court of Justice in Ireland is amalgamated with the Queen's Bench Division.

(2) [1897] A. C. 469.

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Arthur Wilson, K.C.I.E., late Judge of the High Court of India and now Legal Adviser to the India Office, had informed the petitioner's agents that the Court in Calcutta had no power to execute a warrant to enforce the attendance of witnesses from Dibrugarh, Assam, to come before the Court and give evidence of acts of adultery committed in Assam. On the other hand, the adultery was clearly proved by the depositions, and the Irish Court received the evidence and acted on it.

The petitioner was then examined, and proved the cruelty above mentioned. Substituted service was also proved.

THE HOUSE (Earl of Halsbury L.C., Lords Macnaghten and Shand) held that the cruelty and adultery had been clearly made out, and read the bill a second time.

Agents for petitioner: *Tahourdins & Hitchcock, for H. R. Emerson, Solicitor, Dublin.*

Principles applied. BEAMAN *v.* A.R.T.S., LTD. [1949] 1 All E.R. 465.

Applied. BEAMAN *v.* A.R.T.S. LD. [1949] 1 K. B. 550

[PRIVY COUNCIL.]

BULLI COAL MINING COMPANY . . APPELLANTS;

AND

PATRICK HILL OSBORNE AND ANOTHER RESPONDENTS.

J. C.*
1898
July 27, 28, 29.
1899
March 11.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Equitable Jurisdiction—Underground Trespass—Fraud—Statute of Limitations—Champerty.

Although courts of equity are not within the words of the Statute of Limitations, yet they are within its spirit and meaning, and have uniformly adopted its rules.

Where the appellants had furtively for a series of years taken the respondents' coal by means of a wilful and secret underground trespass; and no laches was attributable to the respondents in not discovering the existence of the wrongful workings by the appellants:—

Held, on a summons issued by the latter in the winding-up of the appellant company, that they were entitled to recover from the appellants the market value of all the coal worked and gotten by them from the respondents' land, no allowance being made for the cost of working.

To such a claim the Statute of Limitations has no application. So long as there has been no laches by the party defrauded, it is immaterial whether or not there have been on the part of the wrongdoer active measures to prevent detection.

Ecclesiastical Commissioners for England v. *North Eastern Ry. Co.*, (1877) 4 Ch. D. 845, disapproved.

Held, that an agreement between the respondents and their lessees (under a lease executed before discovery of the trespass) by which the former were indemnified against costs of suit on terms of paying to their lessees 92½ per cent. of the amount recovered was not champertous.

APPEAL from an order of the Supreme Court (Sept. 10, 1897) varying an order of the Chief Judge in Equity (July 27, 1896), made on a summons by the respondents for leave to prove in the winding-up of the appellant company for 45,642*l.*, the estimated value of coal wrongfully taken by that company from under land known as "Watt's Grant," the property of the respondents.

* *Present:* LORD MACNAGHTEN, LORD MORRIS, and LORD JAMES OF HEREFORD.

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The facts are stated in the judgment of their Lordships. The cases in the Courts below are reported in 17 N. S. W. L. R. Eq. 242; 18 N. S. W. L. R. 1 Eq. 146.

The appellants made two defences: (1.) that the land from which the coal was taken was not the respondents' land, that the boundaries of Watt's Grant could not be fixed, and that the grant was void for uncertainty; (2.) that the taking was inadvertent and not wilful, and pleaded the Statute of Limitations.

The Chief Judge found both issues in favour of the respondents, that the position and boundaries of Watt's Grant were as claimed by them, and that the coal was taken wilfully and fraudulently, so that the Statute of Limitations did not apply.

These findings were confirmed by the Court in appeal. The Chief Judge ruled that the quantum of coal extracted must be a matter for reference to the master. His order accordingly directed an inquiry to ascertain the market value at the pit's mouth of all coal worked and gotten by the appellant company from the land in question after making just allowance, but not including the cost of severance.

During the progress of the case a further defence was raised on the ground of an agreement dated March 25, 1895, between the respondents and their lessees, the Bellambi Company, and made four days before the summons above mentioned was issued. This agreement recited the lease which was dated in 1893, the discovery that large quantities of coal had before the date of the lease been wrongfully taken by the appellants, and the consequent loss to the Bellambi Company of the profit it would have made by working and selling such coal. Its effect was that the respondents agreed to pay the Bellambi Company "as compensation for their loss aforesaid" 92½ per cent. of the amount to be recovered from the appellants in respect of the coal wrongfully extracted, and the Bellambi Company agreed to indemnify the respondents against the costs of the proceedings against the appellants, which were to be conducted by a solicitor retained by the respondent and named in the agreement.

The Chief Judge held that this agreement was champertous and illegal, that the respondents were not precluded thereby from enforcing their rights, but were not entitled to costs, since to give them "would be giving effect to the champertous agreement."

The Supreme Court dismissed the appeal of the appellants, and allowed the cross-appeal of the respondents as to the refusal of costs on the ground that the above agreement was champertous, and also as to a certain special direction upon a matter of evidence, referred to at the close of their Lordships' judgment.

The material passage in the Chief Justice's judgment as to the character of the agreement of March 25, 1895, is as follows:—

We are of opinion that the agreement in question is in no sense champertous, as it appears to us to be obvious that both the Messrs. Osborne and the Bellambi Coal Mining Company have "an interest in the thing at variance"—in which case, as pointed out in 1st Hawkins, Pleas of the Crown, 456, the parties are justified in entering into an agreement respecting a matter in which they have legally or equitably a common interest.

Now, what are the facts in this case? When the coal-mining lease of May 15, 1893, was executed the Messrs. Osborne believed that they were leasing to the Bellambi Company, and that company equally believed that they were obtaining a lease of fifty-one acres of coal-bearing land from which not one foot of coal had ever been taken; both parties believed this land to be virgin land.

Subsequently it was discovered that the Bulli Company had before the granting of the lease fraudulently abstracted the coal from underneath about one-third of the land. Now, it appears to be conceded that the Messrs. Osborne have on their own behalf an indubitable claim as against the Bulli Company to recover the value of the coal so abstracted; but it is said that, although the Bellambi Company may have a moral right to receive from the Messrs. Osborne a proportion of the sum recovered, although the Messrs. Osborne may feel in honour

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bound to make good to the Bellambi Company out of the amount recovered the damage flowing to them from the trespass of the Bulli Company, yet the Messrs. Osborne are not in law or in equity bound to do so.

In our opinion the obligation of the Messrs. Osborne does not rest upon moral or sentimental grounds, but upon well ascertained and well understood equitable grounds: if so, then champerty in this agreement is out of the question.

At the time of the execution of the lease of May 15, 1893, both parties to that instrument knew that the land leased was coal land, and believed it to be in a state of nature. Neither knew that in fact all coal had by fraudulent conduct of a third part been abstracted from one-third of the land; both parties were innocently misled into a mutual mistake as to the extent of the thing leased. It was therefore competent to the Bellambi Company to take proceedings to have the lease cancelled, and had they done so there can be no doubt that under the circumstances a court of equity would grant relief by directing that the lease to be cancelled.

The equity to the relief is obvious, and is supported by ample authority: see *Hitchcock* v. *Giddings*. (1) There a purchaser bought the interest of a vendor in a remainder in fee expectant on an estate tail; at the time of the contract the tenant had actually suffered a recovery of which both parties were ignorant until after conveyance executed and a bond given for the purchase-money; accordingly, the contract was rescinded and the bond cancelled; so in *Colyer* v. *Clay* (2), a fund was held in trust for one for life with remainder between B. and C. equally if living with benefit of survivorship between them; B. sold his reversionary interest; at the time of the sale C. was dead, but this fact was unknown to the vendor and purchaser. The Master of the Rolls refused to enforce the contract, saying it would be manifestly unjust, because both parties entered into the arrangements under a common mistake. So in *Hore* v. *Becher* (3), a release was executed upon the supposition of both parties that an annuity had been discharged;

(1) (1817) 4 Price, 135; S. C., Daniell, 1.

(2) (1843) 7 Beav. 188.

(3) (1842) 12 Sim. 465 a.

this turned out to be a mistake; the release was thereupon set aside; and see *Allen* v. *Hammond.* (1)

Now, if the Bellambi Company upon the discovery that one-third of this leased land had been worked out had the right to claim to be relieved of this lease, it is to our minds clear that they had a right to say to the Messrs. Osborne, "You have it in your power to rectify the mistake we both innocently fell into; you can recover for the coal which has been taken and which should belong to us under our contract with you; let us enter into a contract to our mutual advantage by which you will recover the whole value of the coal, which we will then divide between us according to our respective interests." Nor can we see, since the Messrs. Osborne have the power of setting things right, that they are not entitled to say, "Do not seek relief from the contract by asking to cancel the lease; we are in a position to place you in the same position as if the coal had never been removed from the land leased to you." If this be so, it cannot with any reason be contended that there is anything illegal in the contract of March 25, 1895, or that the parties to that contract had not a joint interest in its being carried into effect. On the one hand the Messrs. Osborne were interested in maintaining the lease, and obtaining a sum equal to the royalty they would have got had the coal been upon the land; and on the other hand the Bellambi Company were equally interested in maintaining their lease, provided they got an equivalent in money for the coal which was not but should have been under the land leased. If then there was this joint interest, it mattered not what arrangement they made with respect to the payment of costs.

We are for these reasons of opinion that the agreement was not champertous. If, however, we could come to the conclusion that the agreement was champertous, then we think his Honour the Chief Judge was correct in holding that the Messrs. Osborne were not thereby precluded from enforcing this claim as against the Bulli Company, and for the reasons so clearly stated by his Honour.

(1) (1837) 11 Peters, 63.

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Warrington, Q.C., and *Sims Williams*, for the appellants, after contending that the evidence was not sufficient to locate Watt's Grant, and that it was void for uncertainty, relied mainly on the Statute of Limitations. It was contended that the trespasses complained of were made innocently and without fraud or concealment, the result of a bonâ fide mistake. But assuming the findings of the Courts below to be correct, the Statute of Limitations is as binding in equity as it is in law, and the respondents are barred after the lapse of six years. The respondents have entirely failed to shew that the appellants wilfully concealed what they were doing, or actively prevented the respondents from finding it out. The date from which the statute runs in cases of this kind is the date at which the fraudulent taking was discovered or might have been discovered if proper care had been taken. It is not for the appellants to prove laches on the part of the respondents. It is for the respondents to shew that the appellants took the coal in such a manner as to prevent discovery—that they actively endeavoured to conceal their transactions. The trespass, not its secrecy, is the real cause of action, and that commenced fifteen years ago. Mere non-disclosure of a trespass does not raise any equity to avoid the statute. To effect that result requires wilful and aggressive and calculated concealment. In *Dean* v. *Thwaite* (1), it was intimated that an account of coal taken by underground working would not be limited to the statutory period, if, besides wilful abstraction, steps had been taken to conceal the fact and prevent discovery. *Ecclesiastical Commissioners for England* v. *North Eastern Ry. Co.* (2) is the only case in which an account was directed beyond the statutory period. In *Imperial Gas Light and Coke Co.* v. *London Gas Light Co.* (3), it was stated that it constantly happens that a trespasser takes coal from an adjoining mine, and by fraud prevents its being found out for more than six years; but it was held that that is no answer to the statute. See *Hunter* v. *Gibbons* (4) and *Hovenden* v. *Lord Annesley* (5), where it was held that the Statute of

(1) (1855) 21 Beav. 621.
(2) (1877) 4 Ch. D. 845.
(3) (1854) 10 Ex. 39.
(4) (1856) 1 H. & N. 459.
(5) (1806) 2 Sch. & Lef. 631.

Limitations virtually includes courts of equity. In *Knox* v. *Gye* (1), it was held that a court of equity will act by analogy to the statute, and impose on the remedy it affords the same limit as to time. See also *Booth* v. *Lord Warrington* (2); *Gibbs* v. *Guild* (3); *Barbur* v. *Houston*. (4) [Reference was also made to *Jesus College* v. *Bloome* (5); *Dawes* v. *Bagnall* (6); *Battley* v. *Faulkner*. (7)]

Asquith, *Q.C.*, *Swinfen Eady*, *Q.C.*, and *V. Hawkins*, for the respondents, contended that it was established by concurrent findings that the position and boundaries of Watt's Grant were as claimed by the respondents. Also, that the taking of coal by the appellant company from thereunder was wilful and fraudulent. The trespass being wilful and fraudulent, the remedy was not barred by the statute. Courts of equity have exercised jurisdiction in these cases even in the absence of fraud, which is not a necessary ingredient in order to establish the jurisdiction in equity. The cases on this subject are collected in *Trotter* v. *Maclean* (8), shewing that allowance for the cost of severance or getting the coal has been made where the taking has been inadvertent or under mistaken belief as to title, and refused where it has been wilful or fraudulent, or even negligent. [LORD MACNAGHTEN referred to *Livingstone* v. *Rawyards Coal Co.* (9)] See Story's Eq. Jur. vol. ii., p. 764, s. 1521a, as to the statute running only from the time when the fraud or mistake is discovered. See also *Brooksbank* v. *Smith* (10); *Gibbs* v. *Guild* (3), and the cases there cited, shewing that the same rule is observed in law: see also *Barbur* v. *Houston*. (11) Actual and active concealment is not necessary in order to bar the statute; the foundation of the equitable doctrine being that under all the circumstances it is unconscientious to rely on the lapse of time.

Sims Williams, replied.

(1) (1872) L. R. 5 H. L. 656, 674.
(2) (1714) 4 Bro. P. C. 163.
(3) (1882) 9 Q. B. D. 59.
(4) (1884) 14 L. R. Ir. 273.
(5) (1745) 3 Atk. 262.
(6) (1875) 23 W. R. 690.
(7) (1820) 3 B. & A. 288, 295.
(8) (1874) 13 Ch. D. 574, 586.
(9) (1880) 5 App. Cas. 25.
(10) (1836) 2 Y. & C. Ex. 58.
(11) 14 L. R. Ir. 273; on appeal, (1885) 18 L. R. Ir. 475.

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1899. March 11. The judgment of their Lordships was delivered by

LORD JAMES OF HEREFORD. In this case the appellants seek to reverse a judgment or order of the Supreme Court of New South Wales, dated September 10, 1897, dismissing an appeal against an order of the Honourable William Owen, Chief Judge in Equity, dated July 27, 1896, and allowing a cross-appeal on the part of the respondents against the said order, and varying it in certain particulars.

The proceedings in the Courts below were commenced by a summons issued by the respondents in the winding-up of the appellant company for liberty to prove for a sum of money claimed as the value of coal alleged to have been wrongfully taken by the appellants from land belonging to the respondents. Such claim was, by an order dated December 20, 1895, directed to be tried before the Honourable William Owen, Chief Judge in Equity, and it was accordingly heard before him in April, May, and June, 1896. On July 27, 1896, the learned judge delivered judgment in the case, and afterwards ordered that it be referred to the Master in Equity to inquire and certify what was the market value at the pit's mouth of all the coal worked and gotten by the appellant company from the land of the respondents, being a portion of their land known as Watt's Grant, and that the respondents should be allowed to rank as creditors of the appellant company for such aggregate amount as should be certified by the Master in Equity.

During the hearings in the Courts below the principal defence made by the now appellants to the claim of the now respondents was based upon an alleged champertous agreement.

It was proved that the respondents had, on March 25, 1895, made an agreement with a certain company called the Bellambi Coal Company, whereby it was agreed that the respondents should employ the solicitor of the Bellambi Coal Company to conduct proceedings for the purpose of recovering damages from the appellants' company, and that in consideration of the respondents paying to the Bellambi Coal Company 92½ per

cent. of the amount recovered, that company would indemnify the respondents from all costs and expenses incurred by the taking of the proceedings. It was also found that by an indenture of May 15, 1893, the respondents had leased to the Bellambi Coal Company the land and the coal under it, which had been entered upon and taken by the appellants, so that by their wrongful acts the Bellambi Company had been deprived of coal which was believed by them and the respondents to be the subject of their lease.

The Chief Judge held that the agreement of March 25, 1895, was champertous in its character, but that its existence did not preclude the respondents from enforcing their rights against the appellants.

The Full Court overruled the judgment of the Chief Judge so far as it determined the agreement to be champertous, but agreed with him in holding that if champertous it would not preclude the respondents from enforcing their rights against the appellants.

In his argument before the Committee, the leading counsel for the appellants intimated that he felt he could not rely upon this defence of champerty, and virtually withdrew it. Their Lordships are therefore relieved from delivering any judgment upon the subject, beyond saying that they see no ground for differing from the judgment delivered on this head by the Full Court.

Among the other grounds of defence put forward in the Courts below was the plea of the Statute of Limitations. This plea was dealt with fully by the Chief Judge after he had disposed of the question of champerty in a preliminary judgment. It was raised again before the Full Court, but not much pressed there, and the Full Court simply adopted the judgment of the Chief Judge on this point. It formed, however, the principal subject of discussion at their Lordships' bar, where it was presented by the learned counsel for the appellants in a most elaborate and ingenious argument.

The material facts bearing on the defence of the statute appear in the findings of the Chief Judge, which had the entire concurrence of the Full Court. They were arrived at

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after an exhaustive inquiry lasting for eighteen days, during which much oral and documentary evidence was given. The counsel for the appellants endeavoured to some extent to contest these findings, but their arguments not only failed to shew that there was manifest error in the findings of facts by the Courts below, in which case alone would their Lordships differ from them, but, being called upon by arguments of counsel to consider the correctness of these findings, their Lordships are of opinion that they are in every respect correct.

It appeared that on February 1, 1854, the Crown granted to John Alexander Watt fifty-one acres of land near Bulli Illawarra. By several conveyances the said fifty-one acres of land, known as "Watt's Grant," became vested in Henry Osborne, whose personal representatives are the present respondents. Henry Osborne died in 1858. Early in 1873 the appellants, who were working coal in land adjoining to Watt's Grant, found that their workings were approaching the boundary between the two properties, and so informed the then trustees of Henry Osborne's will, and entered into negotiations with them for the purpose of obtaining a lease of Watt's Grant. These negotiations fell through, but the appellants, proceeding secretly with their workings, entered upon Watt's claim, and between the years 1878 and 1880 removed the coal from under some fourteen acres of such land. The trespass was distinctly shewn upon the appellants' own working plan. It was committed underground, and committed wilfully. Until the workings by the Bellambi Coal Company, under their lease of May, 1893, brought to light the fact that a trespass had been committed by the appellants, the respondents and their predecessors were ignorant of the appellants' wrongful working, and had no reason to suspect that any had occurred.

Upon these facts the Courts below have come to the conclusion that no laches can be attributed to the respondents in not discovering the existence of the wrongful workings by the appellants—a conclusion with which their Lordships entirely concur.

Accepting, however, for the purposes of argument the

findings of the Chief Judge, the learned counsel for the appellants contended that the Statute of Limitations was an answer to the respondents' claim. Their argument was to this effect: Granted, they said, that the trespass was intentional—as indeed most trespasses were—that circumstance of itself was no answer to the plea of the statute. To use the language of Alderson B. (1) there was "no distinction between trespasses underground and upon the surface." It constantly happened, as one of the learned judges observed in the case of the *Imperial Gas Light and Coke Co.* v. *London Gas Light and Coke Co.* (2), that the owner of a coal mine takes coal from an adjoining mine, and by fraud prevents its being found out for more than six years. "Yet that," adds the learned judge, "is no answer to the Statute of Limitations." Clearly it was no defence at law. Why, then, should it be a defence when the claim is put forward in a court of equity? The foundation of the claim must be the same wherever the injured party may seek redress. At law he sues for damages in an action of trespass. If he comes into a court of equity, still it is in respect of the trespass that he claims compensation. There being, therefore, a concurrent jurisdiction at law and in equity in respect of the very same wrong and the very same cause of action, the statute is as binding in equity as it is at law in accordance with the views expressed by the House of Lords in the well-known case of *Knox* v. *Gye*. (3) If, indeed, the respondents had been able to make out a case of what Pallas C.B. (4) terms "active or aggressive concealment," that might have been a different matter. Possibly relief might then have been had in accordance with the principles to be deduced from the case of *Gibbs* v. *Guild* (5) and similar cases. But nothing of the kind was suggested here. The appellants have taken the respondents' coal. Be it so. They have done nothing more. That is the beginning and the end of their offending. It cannot be said that they have done

(1) *Hunter* v. *Gibbons*, 1 H. & N. 459, 465.
(2) 10 Ex. 39, 42.
(3) L. R. 5 H. L. 656, 674.
(4) *Barbur* v. *Houston*, 14 L. R. Ir. 273.
(5) 9 Q. B. D. 59.

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anything actively to prevent the respondents or their predecessors in title finding out what they did.

Such was the contention of the appellants' counsel, but their Lordships are unable to accede to it. It seems to ignore the nature and character of the act of which the respondents complain, and to disregard the principles on which courts of equity proceed in dealing with fraud.

It will not be out of place to cite a passage from the judgment of Lord Hatherley in *Livingstone* v. *Rawyards Coal Co.* (1) before the House of Lords. The House was there dealing only with the measure of damage in the case of underground trespass. But in pointing out the distinction between a case of fraud and a case of inadvertence Lord Hatherley uses very plain language, and his remarks may be useful in clearing the ground. "There is no doubt," said his Lordship, "that if a man furtively and in bad faith robs his neighbour of property and, because it is underground, is probably not for some time detected, the Court of Equity in this country will struggle, or, I would rather say will assert its authority, to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been the one working and the other permitting the working through a mistake. The Courts have already made a wide distinction between that which is done by the common error of both parties, and that which is done by fraud."

In the present case the coal was taken furtively. No one can deny that it is a fraud to rob your neighbour furtively of his property, or that a Court of Equity ought to give redress for such a wrong. "This Court," as Lord Hardwicke (2) presiding in a Court of Equity observed, "has an undoubted jurisdiction to relieve against every species of fraud." Where the remedy is given on the ground of fraud Lord Westbury (3)

(1) 5 App. Cas. 25, 34.

(2) *Chesterfield* v. *Jansen*, (1750) 2 Ves. Sen. 125.

(3) *Rolfe* v. *Gregory*, (1865) 4 D. J. & S. 576, 579.

pointed out that "it is governed by this important principle that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud which has been committed."

The Statute of Limitations has really no application to a case such as this. Courts of equity are not within the words of the statute, which only apply to certain legal remedies, though they are, as it has been said, within its spirit and meaning. The way in which the statute came to be applied in proceedings in equity is explained by Lord Camden in his judgment in *Smith* v. *Clay* (1), which was published from his Lordship's own notes. A court of equity, he says, "which is never active in relief against conscience or public convenience" always refused its aid to stale demands. As, however, it had no legislative authority, it could not define exactly the time of bar. It was governed by circumstances. But as often as Parliament prescribed a limit to proceedings at law the Court of Chancery adopted that rule and applied it to similar cases in equity. "For," he adds, "when the Legislature had fixed the time at law it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period that law had been confined to by Parliament." Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own.

The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his

(1) (1767) 3 Bro. C. C. 639, n.

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opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing," and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote.

There is very little direct authority on the particular point which was urged with so much ingenuity at the bar. Indeed, the case of the *Ecclesiastical Commissioners for England* v. *North Eastern Ry. Co.* (1), before Malins V.-C., was cited as the only reported case in which the account was carried back beyond the period prescribed as a bar by the Statute of Limitations. And their Lordships are compelled to say that they are unable to rely on the decision in that case. It is very difficult to follow the reasoning of the learned Vice-Chancellor. His Honour said distinctly, "there was no improper intention." He held that what was done "was done under a mistake." Yet the defendants were visited with all the pains and penalties of fraud. The account was carried back beyond the six years; the measure of damages was in accordance with the severest rule ever applied. The ground of the decision seems to have been that, although there was no moral fraud—no fraud in fact—yet "for the purposes of the statute the breaking of bounds into a neighbour's colliery must be considered a fraudulent act." There is no foundation for that proposition. Underground trespass may be committed in good faith without any sinister intention, or it may be committed under circumstances which would render the wrongdoer liable to a prosecution for felony. Every case must depend upon its own circumstances. There is nothing in principle, or in authority, or in the exigencies of public policy, to require that the same measure of justice or injustice should be meted out to all trangressors alike, ignorant or wilful, innocent or fraudulent.

In all or almost all the other cases cited at the bar the Court held that fraud was not established. But Sir John

(1) 4 Ch. D. 845.

Romilly in *Dean* v. *Thwaite* (1), and Fry J. in *Trotter* v. *Maclean* (2), expressed their opinion that fraud would or might be an answer to the plea of the statute. In *Dean* v. *Thwaite* (1), where the learned Master of the Rolls held that the evidence of fraud was not conclusive, his Honour made these observations: "The case of fraud alleged, and the only fraud that I think would justify the Court in coming to a conclusion that the coal gotten before that period"—that is before the period of limitation—"ought to be accounted for is that the defendant had intentionally taken the plaintiffs' coal and had concealed the fact, and during the process had taken steps to prevent the plaintiffs discovering it." If those observations are to be construed to mean that in his Honour's opinion something more was required beyond taking the coal furtively, their Lordships are unable to agree in them. But they think that is not the fair meaning of the passage cited, which must be understood as applied to the alleged facts of the case on which his Honour was then commenting. In *Trotter* v. *Maclean* (2) Fry J. remarks that the period of limitation imposed by the statute of James ought to apply to proceedings in the Chancery Division in respect of a trespass, unless there was some equitable ground for repelling the application of the statute. "Such an equitable ground," he adds, "has in many cases been found in fraud. When fraud or any other equitable circumstance exists undoubtedly the statute will not apply." It may be observed that in *Trotter* v. *Maclean* (2) no fraud was suggested beyond the fraud that lies in the secrecy of wilful trespass underground, and that the plaintiffs failed to prove in that case that the trespass was wilful.

Their Lordships are therefore of opinion that the Statute of Limitations cannot be set up as a bar in the present case, and they think that this conclusion is not opposed to any authority.

A comparatively minor question remains to be noticed. By the order of 27th July, 1896, the Chief Judge directed the Master in Equity to inquire and certify what was the market value of the coal which had been wrongly worked and gotten by the appellants under Watt's Grant, and then proceeded to

(1) 21 Beav. 622. (2) 13 Ch. D. 574.

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order: "In making such inquiry the master is to take into consideration that the Court has decided that there is not sufficient evidence to satisfy the Court that the pillars were extracted or that the bords were worked otherwise than in the usual and proper mode of working."

By the order of the Full Court of September 10, 1897, this direction was negatived, the Court ordering "that the Master in Equity should determine the quantum and value of the coal extracted from the said land, freed and unembarrassed by any direction in the said order (of 27th July, 1896) contained as to extraction of pillars or proper working of bords." But in the judgment delivered by the Full Court the following dictum occurs:—

"It appears that his Honour by his order directed the master in making the inquiry to take into consideration that his Honour had decided that there was not sufficient evidence to satisfy his Honour that the pillars were extracted or that the bords were worked otherwise than in the usual and proper mode of working. This objection is complained of and objected to on the part of Messrs. Osborne. It was pointed out that the usual mode of working would be to remove the pillars as soon as the bords were worked out, and that if they were not in fact removed it lay upon the Bulli Company to satisfy the Court as to the fact. We think that this must be so, and that once it has been proved that the coal has been worked from under the fifteen acres it should be presumed until the contrary be shewn that the pillars were worked out and the roofs allowed to fall in."

Their Lordships do not agree with the direction given by the Chief Judge, or with the dictum of the Full Court on the subject. No presumption of any kind as to the pillars having been either left or worked, or the reverse, should be made. The Master in Equity in taking the account must be guided alone by the evidence before him. His task may be a difficult one, but still he must arrive at the quantum of coal taken as best he can. The evidence given by the litigants appearing before him must be his guide, and no presumptions such as have been referred to should affect his decision. Their Lord-

ships express no opinion as to the effect the master should give to any evidence, or the inferences he should draw from it; they only determine that presumption should not exist without being founded on evidence.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed, and that the judgment of the Court below be affirmed. The appellants will pay the costs.

Solicitors for appellants: *G. F. Hudson, Matthews & Co.*
Solicitors for respondents: *Light & Galbraith.*

[PRIVY COUNCIL.]

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } DEFENDANTS;

AND

CORPORATION OF THE PARISH OF NOTRE DAME DE BONSECOURS . } PLAINTIFFS.

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March 7, 9, 24.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, QUEBEC.

British North America Act, 1867, s. 91, *sub-s.* 29, *and* s. 92, *sub-s.* 10—*Municipal Code of Quebec—Powers of Provincial Legislature — Municipal Legislation affecting Dominion Railway.*

By the true construction of British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works:—

But *held*, that the provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land, are intra vires of the provincial legislature.

APPEAL by special leave from a decree of the Court of Queen's Bench (Dec. 23, 1897) affirming a decree of the Superior Court (May 29, 1897), which condemned the appellant company to pay

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY.

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a fine of $200 for failure to clean and put in good order a ditch along the right of way of the company.

The Superior Court, under the circumstances stated in the judgment of their Lordships, based its judgment on the ground that, notwithstanding the provisions of the British North America Act, the company was subject to the provincial civil and municipal law, for the business it transacted within the province, and as to the part of the railway within the province. It held that the articles of the municipal code sought to be enforced were within the powers of the provincial legislature in virtue of sub-ss. 8, 13, and 16 of s. 92 of the British North America Act, and were in no way incompatible with any federal legislation, and particularly with the Railway Act of Canada (51 Vict. c. 29), s. 90, sub-ss. (*g*), (*h*), (*l*) and (*q*), and s. 11, sub-ss. (*q*) and (*r*), and did not encroach at all on the authority of the Parliament of Canada. Also that, by the negligence of the company and its refusal to clean the said ditch and put it in good order, the penalty was incurred.

The Court of Queen's Bench (Hall J. dissenting) confirmed this decree on the ground that the Federal Railway Act excluded from its dispositions all legislation sanctioned before May 25, 1883, and the municipal code came into force in 1870, and consequently was not affected by the dispositions of the Railway Act.

Hall J., held that s. 307 of the Railway Act referred only to the internal economy of railway companies coming under this section, and that even if a railway exclusively under the control of the Dominion Parliament is amenable to certain local and municipal police regulations, these could not extend to interference which would affect the physical condition of the railway, because they would be an encroachment upon the powers of the railway committee under s. 14 of the Federal Railway Act, which provides for the construction of means of drainage or streets through, along, across or under works or lands of the company.

Blake, Q.C., and *Tyrrell Paine*, contended that the decree of the Court of Queen's Bench should be reversed. The appellants

and their railway were, in respect of the matters in question, within the exclusive legislative jurisdiction of the Dominion Parliament. No provincial legislature is competent to enforce or compel the performance of any act which affects the physical condition of their railway. Everything affecting the physical condition of the railway is for the Dominion Parliament. The ditch is part of the railway. A practical and safe remedy for the grievance complained of by the respondents had been provided by means of a reference to the railway committee under the provisions of the Dominion Railway Act: see s. 14, which provides that whenever after due notice of application therefor the railway committee decides that it is necessary in the interest of any municipality that means of drainage be provided, or streets laid along or across the track of a railway, it may direct the terms, &c., upon which such drainage or street may be made; and thereupon such municipality may construct the works necessary, but only under the supervision of such official as the committee may appoint, &c. Reference was also made to ss. 306 and 307 of this Act consolidating former legislation on this subject, and declaring the subjection of the railways there mentioned, including the appellants', to the legislative authority of the Dominion, and saving the authority of provincial legislation prior to May 25, 1883, so far as consistent with subsequent Dominion legislation. Inasmuch as the Dominion Parliament has provided what it deems to be adequate means for the settlement of this matter through the machinery of the railway committee, provincial legislation, even if otherwise applicable, ceased to have any validity. Upon this point reference was made to *Tennant* v. *Union Bank of Canada* (1); *Attorney-General* v. *Brewery Co.* (2); *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces.* (3) The Dominion legislation relied on was Canadian Railway Act, 1888, c. 29, s. 11, sub-ss. (*q*) and (*r*); s. 14; s. 90, sub-ss. (*g*), (*h*), (*i*), (*j*), (*p*). It was contended that everything known as railway legislation exclusively belonged to the Dominion Parliament. Licences, taxation,

(1) [1894] A. C. 45. (2) [1896] A. C. 348.
(3) [1898] A. C. 714.

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rating, matters of police regulation, belonged to the province. But everything relating to the structure of the railway or its ditches or fences was part of railway legislation, however unimportant in detail.

Haldane, Q.C., and *Hohler*, for the respondents, contended that although the appellant railway was a Dominion railway, it was subject in regard to the matter in hand to provincial legislation. The matter in hand had nothing to do with the structure or operation of the railway, nor did it interfere in any way with the exclusive control of the Dominion Parliament over the appellants. The notice of the rural inspector complained of was founded on arts. 867, 870, 871, 875, and 878 of the municipal code of the Province of Quebec, which articles simply provide for the cleaning and putting in good order of municipal watercourses; and on arts. 21 and 22, which provide that every railway company is obliged to contruct and maintain all watercourses on the properties possessed or occupied by it within the municipality. Such provisions cannot be called railway legislation in any sense of the word, and accordingly do not trench upon the exclusive jurisdiction of the Dominion. They relate in terms and in effect to the abatement of local nuisance, to the question of mutual civil obligations as between adjoining proprietors, and accordingly relate to property and civil rights in the province within the meaning of s. 92, sub-s. 13, of the Act of 1867. See also sub-s. 8 and 15. It was contended that the control of ditches draining several properties was essentially a municipal matter; that there was no incompatibility between the Railway Act and the municipal code. *Citizens' Insurance Company of Canada* v. *Parsons* (1) was referred to. The matter in hand is in one aspect of Dominion cognizance, and in another of provincial cognizance. The two jurisdictions overlap, but do not coincide.

Blake, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON. Part of the railway of the appellant company runs through the parish of Notre Dame de Bonsecours, in

(1) (1881) 7 App. Cas. 116.

the district of Ottawa and Province of Quebec; and the respondents are the municipal authority of the parish, under the provisions of the municipal code, of the Province of Quebec.

Sect. 92 of the British North America Act, 1867, assigns exclusively to the legislature of each province the power of making laws in relation to matters coming within the classes of subjects therein enumerated. The class of subjects enumerated in sub-s. 10 is:—

"Local works and undertakings other than such as are of the following classes:—

"(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

"(*b*) Lines of steamships between the province and any British or foreign country:

"(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces."

On the other hand, by s. 91, sub-s. 29, the exclusive legislative authority of the Parliament of Canada is extended to "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislature of the provinces."

It is not matter of dispute that, by virtue of these enactments, the Parliament of Canada had and have the sole right of legislating with reference to the matter of the appellants' railway. As it passes through the parish of Notre Dame de Bonsecours, the railway runs along a piece of ground belonging to one Julien Gervais, from which it is separated by a hedge, which is the boundary of the railway, and the property of the appellant company. Inside the hedge, and between it and the railway track, there is a ditch which has given rise to the present litigation. It is the property of the appellant company, and is part of the railway works.

On June 3, 1896, the rural inspector of the parish served the

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appellant company with a notice, requiring them, within eight days from its date, "à voir à nettoyer, réparer et mettre en bon état le fossé sud de votre voie, à l'endroit ou elle traverse la terre portant le numéro huit des plan et livre de renvoi officiels de la dite municipalité, et appartenant à Julien Gervais." The appellant company did not comply with the notice, and the respondents, the corporation of the parish, brought an action against them in the Superior Court of the province, setting forth the terms of the notice, the failure of the appellant company to comply with it, and concluding that in respect of such failure they should be ordered to pay a sum of $200. The only defence set up by the company, to which they still adhere, was, that the regulation of matters to which the order of their inspector related, which the corporation were seeking to enforce by penalty, belonged to the Parliament of Canada, and not to the Parliament of the Province of Quebec.

In the Superior Court Melhiot J. gave judgment for the municipal corporation on the ground that, notwithstanding the terms of the North British America Act, the ditch in question and the company as its owners were subject to the municipal code of the province. The case was then carried by appeal to the Court of Queen's Bench, when the judgment of the Court below was affirmed by a majority of four judges to one.

The British North America Act, whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, inter alia, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines

which were placed under its charge should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec.

Whether the appellant company ought or ought not to prevail in this appeal depends upon what was the character of the railway ditch in question, and the real nature of the operation which the company were required to perform by the notice of June 3, 1896, which is the basis of the present suit. Ten or twelve words of plain unvarnished statement would have been very useful, much more so than the elegant and fanciful language by which the parties have endeavoured to explain, with the result of obscuring the facts. As to the structure of the ditch itself there is no information ; but it does appear from the terms of the respondents' declaration that, from some cause or another, it had become obstructed, so that the water which it contained escaped and inundated the land of Julien Gervais. The company were required by the respondents' inspector, "nettoyer, réparer et mettre en bon état le fossé." Their Lordships read these words as simply amounting to a requisition that the company should clean the ditch by removing the obstruction, and should restore the ditch to the same state in which it was before the obstruction occurred. They do not think that the verb "réparer" suggests that any structural alteration of the ditch was contemplated. The appellant company have persistently maintained that the work directed to be done by the notice would, if carried out, "have the result of affecting the physical condition of the railway, though it is not alleged that such condition would be thereby

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injuriously affected." These expressions look formidable, but they really mean no more than this: that the removal of the obstruction would affect the physical condition of the ditch, and that the ditch is part of the railway.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The appellant company must pay to the respondents their costs of the appeal.

Solicitor for appellants: *S. V. Blake.*
Solicitors for respondents: *Simpson & Co.*

[PRIVY COUNCIL.]

J. C.* 1898 — Dec. 2, 7, 8, 9. 1899 — Feb. 24.

CROWLY AND ANOTHER . . . . . DEFENDANTS;

AND

BERGTHEIL . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Dolus Malus—Priority of Unregistered Transfer—Registered Transfer set aside.

In a suit against the executor dative of a deceased registered owner of lands in Natal and his transferee to set aside the transfer, it appeared that the plaintiff had taken a transfer from the owner in his lifetime, paid the purchase-money, and received the title-deeds, but had omitted to complete registration, though he had placed a resident agent in possession and management. It also appeared that the defendants had obtained orders from the Court for delivery of certified copies of such title-deeds as having been lost, and for sale by the executor dative by private contract, concealing the fact that the occupier of the lands held under an alleged lawful possession which might possibly be accompanied by possession of the title-deeds, and thereafter effected and registered their transfer:—

Held, that this constituted dolus malus within the meaning of Roman-Dutch law; that the said transfer must be set aside; and that the plaintiff had a locus standi to maintain the suit.

APPEAL from a decree of the Supreme Court (Aug. 1, 1896) whereby it was ordered that the registered deed of transfer by

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Crowly, the first defendant, to Blackburrow, the second defendant, should be cancelled, and that certain lands the subject of that transfer should be transferred by Crowly to the plaintiff.

The question decided in this appeal was as to which of two persons are entitled under the special circumstances set out in their Lordships' judgment to the lands in suit: the second defendant Blackburrow claiming as the registered transferee from Smith, the last registered owner, by virtue of a transfer executed by Crowly, his executor dative after his death; the plaintiff Bergtheil as having become before such transfer and its registration entitled by virtue of a conveyance by Smith to have the land transferred to him on the register, but without having in fact obtained such registered transfer. The decision depended upon whether the evidence shewed that the transaction between the defendants constituted a dolus malus under Roman-Dutch law which entitled the plaintiff to set it aside.

The Chief Justice held that it did not. "By the law of this Colony," he said, "anything short of transfer in due form of law gives the intended purchaser no property, but right of action. . . . . It was not, however, proved in this case that there was any notice to the defendants of the sale from Smith to Bergtheil, and it was not proved that the first or second defendant ever knew that Bergtheil had any claim to the land by reason of any such purchase or as owner of the land."

Mason and Wragg JJ. held that the evidence was insufficient to bring home to Blackburrow such knowledge of Bergtheil's right as a prior purchaser as to justify the setting aside the sale on that ground; but that the sale could be set aside on three grounds: (1.) because Gallwey, who acted as solicitor for Crowly, the executor dative, was also solicitor for Blackburrow, the purchaser; (2.) because the order authorizing the sale was obtained by misstatement or withholding of material facts and minors were concerned; (3.) on the ground of læsio enormis or sale at less than half the value.

Turnbull J. was of opinion that though the declaration alleged no fraud in the acts of the defendants, its statement "that the first defendant was appointed executor dative by the procuration of Smith's widow, who it appears by the plaintiff's

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evidence was well aware of the previous sale to the plaintiff and remembered her husband receiving the money, was sufficient proof to the Court that the plaintiff rightly came before it."

Jenkins, Q.C., *Israel Davis, Q.C.*, and *C. Brousson*, for the appellants, contended on the evidence that the respondent's loss was due entirely to his agent's negligence and laches, by which the appellants had been misled. The appellants were under an honest belief that Smith, whose name remained on the register, was the owner, and that his representatives were entitled to the estates; and the objects of the Natal law of registration would be defeated if an unregistered purchaser were allowed the priority. No case of fraud was made by the pleadings, no sale at an undervalue was proved, and if it had been that was not a ground for rescission. The land was sold with the approval of the Court and by the Court. If it wrongly dispensed with public auction and erred in ordering a copy of the earlier deeds to be delivered out, the purchaser was not responsible. The remedy should be against Smith's estate to recover back the price which the respondent had paid. There was no proof that either of the appellants had notice actual or constructive of the respondent's title, and still less any guilty knowledge of it. Besides, constructive notice is inapplicable to lands registered and transferable according to Natal law. Reference was made to *Barnhart* v. *Greenshields* (1); *Agra Bank* v. *Barry* (2); *Ross* v. *Van Veuren*. (3)

Neville, Q.C., *Danckwerts*, and *Malcolm Macnaghten*, for the respondent, contended that the decision of the Court below was right on the ground of notice. The appellants, by themselves or their agents, had notice that Smith and his estate had ceased to have any title to the lands, and that the respondent, and those claiming under him, were in possession claiming to be lawfully entitled. They had notice of that and other facts, which rendered it their duty to inquire from those in ostensible possession and ostensibly claiming title. By abstaining from such inquiries, and by the representations made to the Court, on the faith of which they obtained delivery of copies of the

(1) (1853) 9 Moo. P. C. 18, 32. (2) (1874) L. R. 7 H. L. 135.
(3) 17 Natal L. R. (N.S.) 251.

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former deeds and an order for private sale, they acted in such a way as to render the transfer sought to be set aside a fraudulent transfer. It was obtained by the fraudulent concealment of facts; which amounted to dolus malus, or fraud, under Roman-Dutch law. With regard to the effect of the respondent being in possession and the consequent duty of inquiry, see Voet, bk. 41, tit. 1, 39; bk. 6, tit. 1, 20; Opinions of Grotius de Bruyn (1894), Notes to Opinion No. 64; Van Leeuwen (Kotze's ed.) vol. 2, p. 105, foot-note; *Natal Land Colonization Co.* v. *Good* (1); *McEllister* v. *Biggs* (2); *White* v. *Neaylon.* (3) Upon the subject of læsio enormis, see Van der Linden, Institutes, p. 103, bk. i. c. 14, s. 4; Introduction to Grotius, bk. 3, c. 52; Opinion No. 89 of De Bruyn's Grotius, p. 632, and the application of that doctrine in *Levisohn* v. *Williams.* (4) See also *Broekmann* v. *Rens* (5); *Walker* v. *Norden.* (6) Upon the question of notice, see *Le Neve* v. *Le Neve* (7); *Jones* v. *Smith* (8); *Travis* v. *Mylne* (9); *Beningfield* v. *Baxter.* (10)

Jenkins, Q.C., replied, citing *Wyatt* v. *Barwell.* (11)

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. This appeal relates to a plot of land containing 160 acres in the neighbourhood of Pietermaritzburg. In the year 1863 five lots, numbered 35–39, were purchased for 364*l.*, and were registered in the name of Edward Smith. These constitute the plot in dispute. In the year 1882 Smith sold it to the plaintiff, now respondent, for 500*l.*; both parties being then resident in England. Smith received the purchase-money, handed over the title-deeds, and executed a power of attorney authorizing the plaintiff or his substitute to make the proper transfer in the register. The plaintiff appointed Mr. Behrens, a resident in Natal and the agent of the Natal Land and Colonisation Company, to be his substitute, and transmitted all the documents to him. Behrens omitted to register

(1) (1868) L. R. 2 P. C. 121.
(2) (1883) 8 App. Cas. 314.
(3) (1886) 11 App. Cas. 171.
(4) (1875) Buchanan's Rep. 108.
(5) (1839) 2 Menzies, pt. ii. p. 15.
(6) (1843) 2 Menzies, 359.
(7) (1747) 2 W. & T. 7th ed. p. 175.
(8) (1841) 1 Hare, 43, 55.
(9) (1851) 9 Hare, 141.
(10) (1886) 12 App. Cas. 167.
(11) (1815) 19 Ves. 435.

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the plaintiff's title, and he handed all the documents over to Mr. Hoffmann, who resided in Durban, and who after that time acted on the plaintiff's behalf. Behrens, indeed, paid the transfer duty due to the Government, and lodged the declarations necessary for the transfer; but it seems that the books were kept in such a way that no notice of these important matters appeared on the register of title. Hoffmann made no use of the land; his only instructions were to sell it; he put it into the hands of a caretaker, Foxon by name, and awaited his opportunity of selling when he could get an adequate price.

Such was the state of things in 1887, when Smith died. The power of attorney held by Behrens then became inoperative; but otherwise the situation was unaltered. Externally things remained just as before, and so they went on till the year 1893, when the defendant Blackburrow, having found out that the land was still registered in Smith's name, employed a solicitor, Mr. Gallwey, with whom he was on terms of intimacy, to discover the owner, and to buy the land for 160*l*. Gallwey put himself into communication with the Smith family, and procured the appointment of the defendant Crowly, as executor dative, and also procured an order of Court for sale by private contract. Under that order the land was sold to Blackburrow for 160*l*., and the sale was duly registered on March 22, 1895. In June, 1895, the plaintiff commenced this action to reclaim the land.

The defendants rely on the registered title. The plaintiffs seek to impeach it on two grounds. First, they say that Blackburrow knew of the plaintiff's purchase from Smith. Secondly, they say that Crowly was a mere instrument in the hands of Gallwey; that Gallwey was in substance the executor of Smith; and that Gallwey not only sold to his own client, but obtained the order for private sale by withholding material facts from the Court.

The four judges of the Supreme Court were divided in opinion. Gallwey C.J. considered that there was no ground either to impute to Blackburrow knowledge of the sale to the plaintiff, or to hold that the Court's order was improperly obtained. The other three learned judges—Mason, Wragg, and Turnbull—

held in substance that the order was improperly obtained, and the sale improperly made, and that the plaintiff had a right to impeach it. Two of them, Sir W. Wragg and Mason J., who delivered judgment for both, considered that Blackburrow knew of Hoffmann's position, but that the evidence was not such as to bring home to him knowledge of the plaintiff's title definite enough to justify them in setting aside the sale on the ground of dolus malus. Turnbull J. does not examine this part of the case, but rests his judgment entirely on the impropriety of the Court's order.

On appeal the plaintiff's counsel have, besides urging the ground taken by the three judges, contended very forcibly that their decree is maintainable also on the ground that Blackburrow knew quite enough of the plaintiff's title to make it dishonest in him to take advantage of the omission to register. Their Lordships think that each of the two parts of the case throws light on the other, and they have found it necessary to review the field of evidence as a whole.

Foxon and Blackburrow each owned a plot of land contiguous to the disputed plot, and each resided on his own land. They were, therefore, close neighbours, and as late as the year 1893 were on very friendly and intimate terms. It was in 1893 that the two quarrelled, when Blackburrow resolved to get the disputed plot for himself. The exact amount of information given by Foxon to Blackburrow about the plaintiff's title is disputed; but their Lordships agree with the judges below in holding it abundantly proved that Blackburrow knew Hoffmann to be in control of the land of which Foxon was caretaker.

It is clear that about the year 1885 Foxon began to exercise apparent acts of ownership over the land. At that time, and for some years afterwards, Blackburrow and Foxon were in the habit of discussing in a friendly way how the plot in question could be purchased and divided so as to benefit the property of both. During the same period Foxon was applying first to Behrens and afterwards to Hoffmann for purchase of the land. Five or six letters, ranging in date from August, 1885, to June, 1890, have been put in to shew what was going on. In them the land is spoken of as Bergtheil's, and Foxon purports to be

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making offers, not only on his own behalf, but on that of Blackburrow and of Blackburrow's father, who lived in the same place. Blackburrow had no part in these letters, but there is not any dispute about the intimacy of the Foxon and Blackburrow families, and it has not been suggested that Foxon had or could during this period have any motive for making false statements about Blackburrow or his father, or for concealing from Blackburrow what passed between him and Hoffmann.

Blackburrow swears that in all these communications Foxon spoke to him of dealing with Smith's agent in Durban; that on one occasion Mrs. Foxon spoke of the land belonging to the Natal Land Company, and that he never heard the name of Hoffmann or of Bergtheil till this suit began. He also says that he looked on Foxon as a mere trespasser. But when, after his purchase, Blackburrow gave Foxon notice that he was proprietor, and warned him not to trespass, Foxon at once wrote to him, reminding him of the prior arrangements between them, and proposing a continuance of them. That was on March 28, 1895, and on April 5 following Foxon asked for explanation, saying, "The least you can do is to afford some explanation, as Mr. Bergtheil's agent in Durban disclaims all knowledge of lease or sale by you." Blackburrow did not answer this letter. In the meantime Foxon had written to Hoffmann a very angry letter, under the impression that Hoffmann had dealt with Blackburrow behind his back, and Hoffmann had answered that he knew nothing whatever about the matter. It is very difficult to believe that the plaintiff's name, mentioned apparently as a matter of course, was a novelty as between Foxon and Blackburrow. The indications of the correspondence are indeed all in favour of Foxon's assertions, and not of Blackburrow's denials.

Their Lordships think that in the following passage of Mason J.'s judgment the effect of the evidence as regards Blackburrow's knowledge in the year 1893 is well summed up. He is speaking of a letter written by Foxon to Hoffmann on January 4, 1886, which shews that Hoffmann and Foxon were widely at variance about the price of the land, and which

makes a proposal to run a fence over it. The learned judge speaks thus :—

"The next letter we have is 4th January, 1886, Foxon to Hoffmann, evidently declining to give the price asked, and then asking permission to occupy the land and run a fence down to the river between Lots 39 and 40, with the right to remove the fence if the land were sold, and promising to take care of the place.

"Hoffmann by letter of 21st January, 1886, agreed to this. The fencing was done in the early part of 1886, under an arrangement with Blackburrow, his half cost of it being set against a claim of his against Foxon for half cost of other fencing, Blackburrow having then put up a fence along Lot 40.

"Blackburrow admits that Foxon said he had permission to fence, but alleges that in this and all subsequent conversation Foxon spoke of Smith's land and Smith's agent in Durban, and that he never until these proceedings heard of the name of either Hoffmann or Bergtheil. Mr. and Mrs. Foxon both declared that the contents of these and the subsequent letters as to these lots were communicated to Blackburrow, and that though they were positive Hoffmann's name was mentioned to him, they thought, but could not swear, Bergtheil's name was mentioned. As to the weight to be given to the evidence of these parties, it appeared to me that John Blackburrow's evidence was quite unreliable throughout; that Foxon's evidence, though not satisfactory, was credible on this point, and that Mrs. Foxon's evidence was very straightforward. Weighing the whole of the circumstances, carefully including the evidence of Blackburrow, senior, which, though very confused, left the impression that Bergtheil's name was known before the sale, I have come to the conclusion that Blackburrow, junior, certainly knew of Hoffmann's name as agent for the land, and also in all probability of Bergtheil's name as the alleged owner."

With respect to the distinction between Hoffmann and the plaintiff, their Lordships think that the probability that Blackburrow knew of the plaintiff's connection with the property is a very strong one. But it is not necessary to say more, because

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the plaintiff was in England; Hoffmann was his local agent, and for the purpose of testing the honesty of Blackburrow's purchase, his knowledge of Hoffmann was tantamount to his knowledge of the plaintiff. The least amount of knowledge which the evidence up to this point carries home to him is that he knew that the land was managed under the authority of an agent resident in Durban; that the agent's name was Hoffmann, and that there was no visible connection between him and Smith.

Their Lordships cannot find that there is much difference between the Roman-Dutch law, which requires proof of dolus to set aside a later completed purchase in favour of an earlier contract, and the English law relating to similar questions in a locality where the system of registration prevails. If there are differences they do not affect this case. In *Le Neve* v. *Le Neve* (1) Lord Hardwicke tests the case by the Roman definition of dolus malus; and the Natal Court has treated the judgment in *Le Neve* v. *Le Neve* (1) as applicable in Natal. The law of Natal is very clearly and fully stated by Connor J. in the case of *Ross* v. *Van Veuren*. (2) The learned judges below have followed the lines of that judgment, and have held that the knowledge which Blackburrow is proved to have possessed was not sufficient to shew the requisite amount of dolus. Looking only at the facts above detailed, their Lordships might hesitate to differ from the Court below; but they do not find that the learned judges have taken into account the strong light thrown by the sequel of the case upon the true state of Blackburrow's mind.

It has been said that after his quarrel with Foxon he determined to get the land for himself. When he first knew that Smith's name was in the register is uncertain, but at all events he now searched the register and found it there. Though he tells us that Foxon had constantly spoken of Smith's agent in Durban, he did not make any inquiry in that quarter. He now alleges that he thought Foxon was deceiving him, but he made no inquiry. What he did was to employ his intimate friend Gallwey to approach Smith's representatives in England.

(1) 2 W. & T. 175. (2) Natal L. R. 96, 251.

From this time forward the relations of principal and agent or client and solicitor must, though attempts have been made to dispute it, be taken to have subsisted between Blackburrow and Gallwey.

Having obtained a clue, Gallwey wrote to Smith's brother on January 8, 1894. After stating that he should be glad to act in the realization of the estate, he added: "There is need of haste in the matter, as a small farmer is to my knowledge enclosing these lands, and under the laws of this Colony will shortly acquire title to them by virtue of his occupation thereof." That assertion has been repeated by Gallwey as his reason for both haste and secrecy, and indeed it is the only explanation of their conduct which either he or Blackburrow has given; but there is no foundation for it. Foxon did not deal with the land till the year 1885; and when he did so he acted avowedly under the authority of Hoffmann and not on his own account. The time for prescription is one-third of a century. The fear of Foxon was a mere pretence, and has been justly treated as such by the learned judges below.

Correspondence ensued between Gallwey and Mrs. Smith, the widow of the registered owner, and her solicitors, Messrs. Mann & Crimp. On November 3, 1894, Gallwey wrote to the solicitors. In answer to their question whether he was in treaty with a purchaser and as to expenses he says:—

"3. (*A.*) I had an offer of 160*l.* for the land if sold privately, but not if put up to auction.

"4. (*A.*) The cost of sale privately would be from 3*l.* to 10*l.*

"5. (*A.*) Cost of sale by public auction would be about 30*l.* or more."

And in the same letter he adds:—

"I pointed out to Mrs. Smith in my letter to her of the 9th January, 1894, that there was need of haste in this matter. Will you please impress upon her that if correspondence between us is treated in the leisurely manner hitherto followed I shall not be answerable for the consequences of the delay. Title to land in this Colony may be acquired by possession alone. I send another power of attorney to be inserted in

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place of the one previously sent home as it is incorrect, Mrs. Smith not being the universal heiress.

"I require, in addition to the documents specified in the accompanying schedule, instructions from you as to—

"1. Whether I am to sell publicly or privately; and

"2. Whether I am to take 200*l.* or less.

"Will you reply as early as possible in order to avoid the contingencies of a lawsuit and its attendant heavy expenses."

He does not mention that it was his own client who was seeking to purchase for 160*l.* There was no pretence whatever for the assertion that a lawsuit was to be expected. Blackburrow and Gallwey were asked for explanation of the threat so held out, but they failed to give any. It is hardly necessary to distinguish between the acts of Gallwey and those of Blackburrow, but in point of fact Blackburrow tells us that this correspondence was framed under his instructions.

Having got the requisite documents, Gallwey procured the appointment of his clerk Crowly as executor dative on January 14, 1895. There would have been nothing wrong in this appointment considered by itself, and if all matters necessary for the Court to know had been duly disclosed to it; but the result was that Gallwey and not Crowly was for all substantial purposes the executor, and that the identity of solicitor and executor favoured the secrecy which Gallwey and Blackburrow desired. Apparently the only act of personal judgment which was exercised by Crowly was in February, 1895, when some persons made inquiries of him about the land saying they understood it was in the market. Then he thought it desirable to keep silence. He told them he knew nothing about it. He did not report their inquiries to the Court, or even as he says to Gallwey, nor did he trouble his head about them any further. In fact, by the judgments below and throughout the arguments at this bar on both sides, Gallwey has been treated as executor and Crowly only as a phantom; though it is remarkable what pains the two have taken to keep up an appearance of independence.

The next step was to obtain substitutes for the lost title-deeds, as shewn by the two following letters between Gallwey

and Crowly, written as if the two were really conveying instruction and information to one another :—

"W. J. Gallwey, Esq.,
"Solicitor.

"Pietermaritzburg,
"18th January, 1895.

"Dear Sir,—Please proceed for obtaining new title-deeds of the property of Edward Smith's estate, Lots 35, 36, 37, 38 and 39 of Little Bushman's River. I propose to ask for private offers in the matter.

"Yours faithfully,
"(Signed) EUGENE BERND. CROWLY.
"Exectr. Dative."

"E. Crowly, Esq.,
"Execu. Dat. Est. Smith.

"245, Church Street,
"Pietermaritzburg, Natal,
"19th January, 1895.

"Dear Sir,—Your favour to hand. I shall be glad to proceed for new deeds herein, but would suggest waiting in reference to obtaining order until more is ascertained from home regarding the alleged insolvency.

"I am, as you are doubtless aware, acting in the interest of the widow under power of attorney.

"Yours faithfully,
"(Signed) W. J. GALLWEY."

Accordingly, on January 25, Gallwey applied for an order upon the Registrar of Deeds, stating in his affidavit that he was acting under the instructions of the executor dative, and that diligent search and inquiry had been made by the widow for the title-deeds without any result. The only foundation for this statement is that Smith's widow had written on July 13, 1894, as follows: "He bought in 1863, but I cannot find among his papers the required title-deeds." Gallwey himself made no inquiry of the man in possession of the land, nor did he inform the Court that there was a person so dealing with the land.

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On February 26, 1895, Gallwey applied for an order for private sale. The matter was referred to Master Broome, who reported on March 9, not giving any definite opinion, but suggesting rather that the sale should be by public auction.

The next step was to make a private contract for sale, and this was done by the following letters written between Crowly and Blackburrow as if the affair were wholly new to them :—

"To E. B. Crowly,

"Exor. Mr. Smith's estate.

"Dear Sir,—I believe you have for sale Lots 35, 36, 37, 38, and 39 of Little Bushman's River in extent 160 acres. Part of the land is very stony and unfit for any use except grazing.

"I will give you 160*l.* for the land if you will let me have a reply within a week, transfer to be given within one month, and I will pay the cash on transfer to me being ready. I can give you security if you like.

"Yours truly,

"J. BLACKBURROW.

"Broadleaze, 4th March, 1895."

"J. Blackburrow, Esq.,

"Broadleaze.

"Pietermaritzburg,

"7th March, 1895.

"*Re* Land Est. E. Smith.

"Dear Sir,—In reply to your letter of 4th inst. I beg to state that I accept your offer provisionally for the 160 acres of land situate at or near the Little Bushman's River subject however to the decision of Sir Walter Wragg as to whether the sale of the land can be made privately or to be put up for public competition.

"Yours truly,

"(Signed) EUGENE BERND. CROWLY,

"Extr. Dative Est. E. Smith."

It is hardly necessary to add that the proposal to ask for private offers made in the letter of January 18, which was signed by Crowly, began and ended with this acceptance of Blackburrow's original design.

On March 8 Mr. Broome made some inquiries of Gallwey, which were answered in the name of Crowly as follows:—

"Master,

"Supreme Court. Pietermaritzburg,

"8th March, 1895.

"*Re* Estate Smith.

"Sir,—I have received an offer of one hundred and sixty pounds (160*l.*) sterling for the five lots in the above estate together 160 acres.

"As far as I am aware the land is unproductive of any rents or other income.

"The land is not likely to increase in value during the minority of the children.

"A condition stipulated in the above offer is that transfer is to be given within one month from the date of its acceptance. I am limited to Monday next to accept or refuse.

"Yours obediently,

"EUGENE BERND. CROWLY,

"Exectr. Dative.

"P.S.—Mr. Gallwey referred your letter to me to which the above is my reply."

On the same March 9 the case was carried before Sir W. Wragg in chambers, who made a formal order for a private sale. On the same day a formal acceptance of Blackburrow's offer was sent in the name of Crowly, and the formal acts of transfer were completed by March 22.

So ended the long drama which was enacted between the end of 1893, when Gallwey was first employed by Blackburrow to get the land, and March 22, 1895, when, having made himself executor through his nominee Crowly, he sold it to his client for the price which his client had originally told him that he would give. From first to last their Lordships cannot find any ingenuous statement of the known facts made to those who were concerned to learn them.

As regards the Smith family, Gallwey's letters never mentioned that the man who was occupying the land alleged that he was doing so under the authority of an agent in Durban.

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For this purpose it did not signify much whether the agent had been mentioned by Foxon as Smith's agent, which is the defendant's account of the matter, or as the plaintiff's agent. If it had been disclosed that the occupier asserted that he held under any local agent for the owner, it is very unlikely indeed that Mrs. Smith's solicitors would without inquiry have advised her to deal with the estate in a way which, on the supposition that the land was vacant and open to the first trespasser, would seem reasonable: but on the supposition of an ownership by somebody else would be a wrong to him and a disaster to her. But the fact of an alleged lawful possession was suppressed; haste was urged on grounds which will not bear examination; and though Gallwey's letters did not advise a private sale, they made statements which led up to it, and they did advise the appointment of Gallwey's clerk as executor.

The Court itself was treated no better. A private sale by an executor is only authorized in exceptional cases, and it is the executor's duty to give the Court the fullest information of everything bearing on the question. That Blackburrow was Gallwey's client was a very material circumstance. That he had a formal provisional contract with Crowly was material. The occupation of Foxon under allegation of lawful title was a very important circumstance. His statement, persisted in for several years, that there was a person in Durban professing to be agent whether of Smith or of another was a very important circumstance. It was very important for the Court to know that no search whatever had been made for the title-deeds except in a place where, on the supposition of a transfer, they would not be; but the Court was told that the widow had made diligent search and inquiry. The inquiries which Crowly says were addressed to him were material, as shewing that there was some interest taken by others in the land. If the true relations between Gallwey and Crowly were not disclosed to the Court (and the letters above quoted are certainly calculated to throw a veil over them), that was a material concealment. Is it to be supposed that the Court, if it had known such things, would not have directed inquiries to be made about Foxon either as representing a lawful interest or as a

probable bidder? Would not the Court have surmised that the missing title-deeds might be with the person mentioned as agent, and that no proper search had been made till that clue had been followed up? Would it have proceeded without advertisement and without public intimation of Crowly's appointment? It is not for those who kept the Court in ignorance to answer these questions favourably to themselves.

That orders obtained as were the orders of January 25 and March 9 can stand as against any person entitled to complain of them is a proposition which has not been maintained in argument here. But how do these transactions bear on the question what was in the minds of Blackburrow and Gallwey when they conducted the correspondence and the legal proceedings above detailed? It is impossible to separate the two as regards this question. Their Lordships ask why was all this studious concealment of the truth from the Smith family and from the Court practised? The only reason assigned is that it was desirable to keep Foxon in the dark. But why? The suggestion of his giving trouble by adverse title is purely frivolous. Only two substantial motives can be suggested for keeping Foxon in the dark. One is to prevent his bidding, so that Blackburrow may get the land cheaper. That involves such a gross and glaring betrayal of his post of trust for the Smiths which Gallwey had solicited and obtained from them that their Lordships are not disposed to believe it. If Mason J. had believed it, he would not have confined himself to charging Gallwey with grave error of judgment. That one of the learned judges, Turnbull J., who did believe it, speaks of Gallwey's conduct in harsher terms. The other possible motive is to prevent the true state of the title from becoming known. That is not creditable, but of the two motives it is the least discreditable. To effect this concealment the parties entered into the long course of suppression of truth with occasional suggestion of falsehood which has been stated. That is hardly explicable unless they were convinced that the rightful claim was not at one with the registered title. Coupling this course of conduct with the knowledge of Hoffmann's position, denied by Blackburrow but brought home to him by clear evidence,

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their Lordships conclude that, though very likely he did not know the exact mode in which Hoffmann or the plaintiff became interested, he did know perfectly well that they represented a lawful interest.

If this is too harsh a conclusion, Blackburrow and Gallwey have only themselves to thank for it. Their own case is that they were trying to hoodwink Foxon; and this they did effectually, though by methods that cannot be justified in law or in honour. That object of their circumvention was too small a matter to call for so much dolus. It is incredible that for so unsubstantial a reason Blackburrow would suggest and Gallwey write misleading letters to the Smiths, and that Gallwey would have taken the dangerous course of placing a delusive case before the Court to obtain an ex parte order. Their Lordships think that what they were trying to circumvent was the more substantial obstacle of the interest represented by Hoffmann: namely, the plaintiff's claim to have the land as against the heirs of Smith. That will fall within the narrowest definition of dolus malus.

As regards the second question, the defence is of a purely technical nature. It is impossible to contend that the sale to Blackburrow can stand against any one entitled to complain of it. Who then is to set it aside? It would be the executor's duty to do so, but that cannot be, because he himself has brought it about. The case, therefore, is one in which a person interested in the property wrongfully sold can maintain a suit. The defendants' counsel argue that, though the heirs of Smith might set the sale aside, the plaintiff, not having any specific property in the land, but only contractual rights against Smith, has no such status as entitles him to sue. This, however, is a misapprehension of the plaintiff's position.

It is true that by the law of Natal a purchaser of land, though he may have paid the price, is not until regular legal transfer the owner of the land, but is only one who has a claim against the vendor. To speak of him as the true owner in the language of an English Court of Equity, though the expression may be used in speech for brevity's sake, is not correct, and if there were other claimants against Smith or his estate it would

be misleading; but the plaintiff's claim against Smith is beyond dispute, so that as between those two the plaintiff might have become the owner of the estate at his own will and at any moment. And as in this case it has been found that there are no adverse claims against Smith's estate, the plaintiff's legal right against his executor is the same as against himself; only that owing to the expiry of Smith's power of attorney fresh formalities became necessary. Therefore, at the date of the sale, the plaintiff was, as between him and Crowly, the person indisputably entitled to have the transfer made to him. Their Lordships are by no means clear that if the Smiths came to set aside the sale it would not be a good answer to say that they had no interest in it, because they could not retain the estate for a moment against the plaintiff. However that may be, they could have no motive to promote such a suit, nor is it easy to see how the plaintiff could compel them to do so.

Moreover, it is clear that on a sale the plaintiff would be entitled to the purchase-money, and he has a direct interest to complain that the course taken by the executor has damaged the price. The Court below treated him as a creditor entitled to sue because the executor is disabled from suing. He is that according to Natal law. But he is more than that: he is a creditor of a very special kind—one who, in the absence of other claimants, has a right to demand the very property in dispute. Not only has he a position which enables him to maintain this suit, but he is the only person who has a motive to maintain it, and perhaps the only person who could do so.

Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors for appellants: *Atkinson & Dresser.*
Solicitors for respondent: *Kimbers & Boatman.*

[PRIVY COUNCIL.]

J. C.* 1899 March 24; May 3.

SPILSBURY . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR.

Criminal Jurisdiction and Procedure—Supreme Court at Gibraltar—Morocco Consular Court—Trial at Gibraltar should be by Jury.

The Consular Court of Morocco and the Supreme Court of Gibraltar having a concurrent jurisdiction in the matter of an offence charged against the appellant, he was arrested in London and ordered by the Queen's Bench Division to be tried before the Supreme Court at Gibraltar:—

Held, that as an incident to that order he was entitled to be tried according to the procedure of that Court, that is (see s. 38 of the Gibraltar Order in Council), by a jury.

APPEAL from an order of the Supreme Court (Sept. 5, 1898) ordering the appellants to be tried for certain alleged criminal offences with or without assessors, in accordance with the Morocco Order in Council, 1889, and the rules thereunder relating to the trial of indictable offences, and not with a jury.

The question decided in appeal was whether the appellant should be tried according to art. 38 of the Supreme Court Consolidation Order (Gibraltar), 1888—that is to say, by the Chief Justice and a jury of twelve men.

Cohen, Q.C., and *Ellis J. Griffith*, for the appellant, contended that he should. The order of the Queen's Bench Division was that he should be tried before the Supreme Court of Gibraltar at Gibraltar. The Secretary of State ordered that he should be placed in the custody of the Supreme Court of Gibraltar and within its jurisdiction. Thereupon the right of the appellant accrued to be tried in the manner prescribed by s. 38 of the Supreme Court Consolidation Order (Gibraltar),

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD DAVEY.

1888. It was contended that such part of the Morocco Order in Council, 1889, as prescribes trial in this case by a judge with or without assessors is repugnant to the Gibraltar Order, and to the extent of such repugnance is void: see Foreign Jurisdiction Act, 1890, s. 12 (1.). No rules of procedure had at the date of the offence been made under art. 11 of the Morocco Order, which in itself does not comply with the requirements of s. 9 of the Act of 1890. By no act or order is the appellant deprived of his constitutional right as a British subject to be tried for his alleged offence by a jury of his peers.

The Attorney-General (*Sir R. Webster*) and *Sutton*, for the respondent, submitted that the order was right, and should be affirmed. The Consular Court of Morocco was established and is regulated by the Morocco Order in Council, 1889, made under the powers given by the Foreign Jurisdiction Acts, 1843 to 1878, and Her Majesty's jurisdiction in Morocco is vested in that Court. The appellant's alleged offence is within the jurisdiction of that Court, as defined by the order, which contains no provision relating to a jury. The order of the Queen's Bench Division in this case was made under s. 35 of the Fugitive Offenders Act, 1881, which does not give power to create any jurisdiction to try a defendant, but only to send him for trial to some place where jurisdiction to try him already exists. The jurisdiction to try him at Gibraltar arises under ss. 4, 11, and 19 of the Morocco Order, and not under the Gibraltar Order. The procedure, therefore, to be adopted, it was contended, was that prescribed by the Morocco Order.

Cohen, Q.C., replied.

1899
May 3.

The reasons for the report of their Lordships were delivered by

THE LORD CHANCELLOR. This was a case in which the appellant, Albert Gybbon Spilsbury, appealed against an order of the Chief Justice of Gibraltar whereby the appellant was ordered to be tried at Gibraltar without a jury for an offence alleged to have been committed within the jurisdiction and under the provisions of the Morocco Order in Council, and the

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rules thereunder relating to the trial of indictable offences, and not with a jury.

The offence charged against the appellant was that in January, 1898, within the territorial waters of the Empire of Morocco, he had together with others been guilty of riot and assault upon soldiers of the Sultan of Morocco, and participating in an armed attack made on a ship belonging to the Sultan and upon soldiers and officers therein.

The appellant was arrested in London, and in the month of August, 1898, the Queen's Bench Division of the High Court ordered that the appellant should be tried before the Supreme Court at Gibraltar, and by a warrant under the hand of one of Her Majesty's Principal Secretaries of State he was ordered to be removed for trial before the Supreme Court of Gibraltar.

In pursuance of such order and warrant the appellant was in fact conveyed in custody to Gibraltar in the month of August, and surrendered to the Court there.

The doubt which the Chief Justice of Gibraltar appears to have entertained—whether he had authority to order the trial before a jury, or whether he was bound to pursue the course of procedure pointed out by the Morocco Order in Council in respect of offences committed in Morocco—was the question which gave rise to this appeal.

Their Lordships are of opinion that unless some order has prohibited in such a case the ordinary course of procedure, the transfer of the appellant to Gibraltar to be tried for a criminal offence, would, as incident to such order, involve his being tried according to the ordinary course of procedure in that place; and the Chief Justice appears to have entertained doubt whether the sections of the Morocco Order in Council did not enforce upon him the necessity of trying the defendant according to the procedure contemplated by that order—that is to say, with assessors and not by a jury.

Their Lordships are not able to share in those doubts. The machinery provided for the trial in Morocco appears to be applicable to that country and appropriately worded. But by the 11th sub-section of Order 3 it is provided that the Supreme Court (that is, the Court of Gibraltar) is to have in all criminal

matters in which the defendant is a British subject (which was the case here) an original jurisdiction concurrent with the jurisdiction of the Court for Morocco, to be exercised, it is true, "subject and according to the provisions of this order and of any rules of procedure made under this order" (and none such have been made), "but in all other respects with all the powers and authority which the Supreme Court has independently of this order."

Their Lordships are of opinion that s. 38 of the Gibraltar Order in Council expressly applied to the appellant's case.

It was a criminal case depending before the Supreme Court of Gibraltar which had (as has been pointed out before) concurrent original jurisdiction with the Court in Morocco. Once it is ascertained that the Supreme Court of Gibraltar was rightly seised of the jurisdiction to try, their Lordships think that the mode prescribed by the Gibraltar Order in Council must be pursued. That order makes no distinction between cases originally arising in Gibraltar, and those which by due course of law may be brought thither; and it is obvious that the various provisions to be found in the Morocco Order in Council, in respect of the mode of trial with assessors, would be inappropriate to a trial in Gibraltar, where a regular course of trial by jury forms part of the administration of the place.

Their Lordships have, therefore, thought it right humbly to advise Her Majesty that the mode of trial demanded by the appellant is that to which by law the appellant was entitled.

Solicitors for appellant: *Hollams, Sons, Coward & Hawksley.*
Solicitor for respondent: *Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1898 Nov. 28. 1899 May 18.

AUSTRALIAN JOINT STOCK BANK, LIMITED . . . . . } PLAINTIFFS;

AND

BAILEY. . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Guarantee—Bond—Construction—Recital and Condition.

The respondent with others gave a joint and several guarantee to the appellant bank limited to 2500*l.* in respect of overdrafts by a customer. Subsequently he with others gave a joint and several bond reciting a desire for advances to the same customer over and above that amount, and securing repayment of the balance of account current.

In an action brought both on the guarantee and bond, the former was held to be invalid; but

Held, that the condition of the bond, being plainly to secure repayment of all moneys advanced by the bank and not merely those in excess of the said 2500*l.*, could not be controlled by any recital not plainly inconsistent therewith.

APPEAL from an order of the Supreme Court (May 28, 1897) directing that the verdict found at the hearing in favour of the appellants for the sum of 2299*l.* be reduced and stand at 1297*l.*

The appellants sued to recover 5082*l.*, being 2783*l.* due on a guarantee, and 2299*l.* due on a bond. Both instruments are described in their Lordships' judgment, which also states the facts of the case.

At the trial a verdict was found for the respondent on the guarantee on the ground that the appellants had discharged the guarantors from liability thereunder by striking out the name of one of them without the assent of the rest; and against the respondent on the bond for 2299*l.*, the amount claimed by the appellants as due thereon, leave being reserved to the respondent to move for a rule to reduce the amount to 1297*l.*, the sum admitted by him to be due on the bond.

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Upon the argument of the rule the appellants' contention was that the sureties were liable under the bond for the full amount of 2000*l.* with interest and costs. The contention of the respondent was that the liability of the sureties was limited to the balance of 5082*l.* after deducting the amount of 3785*l.*, the amount intended to be secured by the guarantee, and which would have been so secured had the same been valid.

Owen and Stephen JJ. adopted the view of the appellants; Darley C.J. that of the respondent.

Joseph Walton, *Q.C.*, and *Atkin*, for the appellants, contended that the bond was quite distinct from the guarantee. By the terms of the former the liability of the respondent extended to the whole debt incurred, limited to the sum mentioned in the bond. The operative part of the bond was clear to that effect. There was nothing in the recital inconsistent therewith; if it were, it could not control the plain terms of the condition. Even if the bond extended only to advances in excess of those guaranteed, the guarantee had fallen through, and there was no guaranteed amount to deduct.

C. A. Russell, *Q.C.*, and *Morten*, for the respondent, contended that on the true construction of the bond the liability of the sureties was limited to the balance of the debtor's indebtedness after deducting the amount intended to be secured by the guarantee. The intention of the parties was that the guarantee should enure for the benefit of the sureties under the bond. The respondent would have been entitled to deduct from his liability under the bond the amount recovered from him under the guarantee. The appellants by their own act rendered the guarantee void. They discharged the sureties from all liability thereunder. The respondent was entitled to the benefit of that discharge when sued on the bond; otherwise it was of no avail to him.

They referred to the recital in the bond, and contended that the condition in the bond was larger than the recital, and that the recital consequently restrained it: see on this point *Pearsall* v. *Summersett* (1); *Lord Arlington* v. *Merricke*. (2)

(1) (1812) 4 Taunton, 593. (2) (1673) 2 Saund. 411 a.

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As to the discharge contended for, see *Ellesmere Brewery Co.* v. *Cooper*. (1)

Counsel for the appellants were not heard in reply.

1899. May 18. The judgment of their Lordships was delivered by—

LORD MORRIS. In this case a question has been raised as to the true construction of a bond bearing date September 17, 1889, and executed in favour of the Australian Joint Stock Bank, Limited, by the Clarence River and North Coast Farmers' Co-operative Association, Limited, and by certain directors of the association and the manager as their sureties. One of those sureties was the respondent, George Bailey, who was a director of the association.

More than two years before the date of the bond the respondent and other persons interested in the association as directors and shareholders had signed a letter addressed to the manager of the bank and dated June 17, 1887, purporting to be a continuing guarantee for overdrafts by the association to the extent of 2500*l.*, interest and charges.

The bond of September 17, 1889, was a joint and several bond in the penal sum of 4000*l.* The condition of the bond is prefaced by the following recital: "Whereas" the association, "in addition to the sum of 2500*l.* and interest and charges secured by guarantee dated the 17th day of June, 1887 . . . . are desirous of obtaining credit advances and accommodation from" the bank, "and in order to induce" the bank "to afford them such credit advances and accommodation . . . . it has been agreed that all the debts interest and liabilities thence to arise shall be secured by the above written bond" of the association and their sureties therein named, "*with the following condition.*" Then comes the condition of the bond. Stated shortly, it is to the following effect. If the association or their sureties or any or either of them should from time to time and at all times reimburse and pay to the bank "all moneys whatsoever" which the association should borrow from

(1) [1896] 1 Q. B. 75.

the bank, and all other moneys which the bank should advance for the accommodation of the association "or otherwise on their account," or in which they should "in any manner whatsoever become indebted" to the bank, and, further, should from time to time pay to the bank all moneys which should be due and owing from the association to the bank by reason of any such advances and transactions as aforesaid "or otherwise," according to an account current to be made up from the books of the bank, to be signed by the manager or accountant of the bank (which account was to be taken as primâ facie evidence of the matters therein set forth) the bond should be void, but otherwise should remain in full force and virtue. Then it was provided that the bank should not be bound to give the full amount of the contemplated accommodation "or any larger part thereof" than might from time to time be deemed expedient by the bank; and, further, that the liability of the sureties under the bond should not extend to more than the sum of 2000*l.*, interest and costs.

In the action out of which this appeal arises, the respondent was sued both on the guarantee and on the bond. He succeeded in establishing that the guarantee was invalid as against him, and then his contention was that, according to the true construction of the bond, his liability under that instrument was confined to advances beyond the amount which the letter of guarantee purported to cover, or, in other words, that the amount appearing to be due to the bank on account current ought, in the first instance, to be reduced by deducting the amount which the letter of guarantee, if valid, would have secured.

In the Supreme Court two of the learned judges upheld the respondent's contention; Darley C.J. dissented.

Their Lordships have no hesitation in expressing their entire concurrence with the judgment of the learned Chief Justice.

No question of fact or of general law was in debate. It was common ground that a surety is not to be bound beyond the scope of his engagement, and that the scope of the surety's engagement is to be gathered from the whole instrument in which his obligation is contained. In the present case the

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condition of the bond as it stands is perfectly clear. It is not suggested that in that part of the instrument any trace can be discovered of the limitation which the respondent seeks to introduce. The question, therefore, is whether the recital on which the respondent relies is so inconsistent with what follows as to make it clear that the condition of the bond must be qualified in order to carry out the plain intention of the parties.

In their Lordships' opinion there is no inconsistency whatever between the condition of the bond and the recital by which the condition is introduced. In effect the association and their sureties say to the bank: "The association wants further accommodation. In order to induce you to comply with their request"—which, it must be borne in mind, the bank were under no obligation to do, even after the execution of the bond —"all further advances you may be good enough to make shall be secured by this bond covering, not only those advances, but the whole indebtedness of the association subject to a limit of amount in favour of the sureties." That seems to their Lordships to be the plain meaning of the language used if the instrument be read fairly from beginning to end, and it is just the sort of proposal which persons wanting accommodation would naturally make to their bankers. On the other hand, the arrangement which the learned counsel for the respondent seek to evolve from the recital in the bond is one which probably would not have been very attractive to the bank if they had understood it.

Their Lordships agree with the learned Chief Justice in thinking that "The bond is not a bond only for the excess of advances over 2500*l.*, but it is to secure the repayment of all moneys according to an account current to be made up from the books of the bank."

Their Lordships will, therefore, humbly advise Her Majesty that the order of the Supreme Court of New South Wales of May 28, 1897, should be set aside with costs, and the verdict for 2299*l.* restored.

The respondent must pay the costs of the appeal.

Solicitors for appellants: *Walker, Martineau & Co.*
Solicitors for respondent: *Clapham, Fitch & Co.*

[PRIVY COUNCIL.]

PILKINGTON . . . . . DEFENDANT; J. C.*

AND 1898

GRAY AND ANOTHER . . . . . PLAINTIFFS. *Dec.* 14, 16.

ON APPEAL FROM THE COURT OF GENERAL ASSIZE OF BERMUDA IN CHANCERY. 1899 *Feb.* 24.

Will—Evidence of Execution—Denial by Attesting Witness—Testamentary Capacity.

Case in which probate of a will which had been originally granted on the evidence of the two attesting witnesses was confirmed, notwithstanding that one of them retracted his evidence and in effect swore to the signatures of testator and witnesses having been forged, and the other witness was not called. In the circumstances, the later evidence of the one was held to be incredible, and the absence of the other to be satisfactorily explained.

Testamentary capacity is not disproved by evidence of the testator's merely eccentric acts and conduct.

APPEAL by special leave from a decree of the above Court (Aug. 3, 1896), finding in favour of the respondents that the will of Samuel Chapman, deceased, propounded by them as its executors, and dated July 11, 1883, had been executed by the testator according to law, and that he was of sound disposing mind at the date of its execution, and granting administration of his estate as prayed.

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the appellant, contended that as one attesting witness denied the execution of the will, and the other was not called, and no satisfactory explanation of his absence given, probate could not be confirmed and ought to be revoked. Also, that the evidence shewed general debility of mind and body on the part of the testator amounting to testamentary incapacity.

Sir R. Reid, Q.C., and *Cowell*, for the respondents, were not heard.

* *Present:* LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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1899. Feb. 24. The judgment of their Lordships was delivered by

SIR RICHARD COUCH. On September 6, 1883, probate in common form was granted of a will of Samuel Chapman, who died on August 28, 1883, domiciled and resident in Bermuda, and possessed of real and personal estate there. The probate was granted on the oaths of Gustavus Barron Griset and Alfred Stewart Perry, the attesting witnesses, that the will was duly executed and attested according to the law of Bermuda, which is the same as the law of England. Under this will the respondents, who are father and son, are trustees and executors, and are each entitled to a legacy of 200*l.* and to professional charges for all professional services, and to a commission of 5 per cent. on all moneys passing through their hands. The testator left a widow and one son and three daughters. The will, after making a provision for the widow, left the whole of his property, except a considerable estate in Cuba, which was the subject of another will called his Cuba will, for the benefit of Mrs. Neave, one of the daughters, and her children. The appellant, Mrs. Pilkington, is another of the daughters.

On December 20, 1889, the respondents filed their bill of complaint in the Court of General Assize of Bermuda in Chancery, to have the will confirmed and established, and for an order of administration. It appeared in the bill that this was done in consequence of doubts and suspicions having been thrown upon the validity of the will by the sayings and doings of the widow and the son, and the appellant and her deceased husband. The appellant was the only defendant who contested the will. Mrs. Neave and her husband filed an answer concurring in the prayer of the bill, and the heir-at-law and the other defendants did not enter an appearance. The appellant had no solicitor, and was represented by a Mr. Mark Golinsky, not a lawyer, who was, under an old Act of Parliament of Bermuda of the year 1690–1691, allowed to represent her. In her answer she denied the validity of the will on the grounds that the testator was not in a sound mental condition to make and execute a will, and that the will was not executed as required by law to pass real and personal estate in Bermuda.

The respondent, Samuel Brownlow Gray, gave his evidence on July 11 and 12, 1893. He deposed that he was a barrister of Lincoln's Inn, was called to the bar in June, 1847, came to Bermuda the same year, and had ever since continuously practised his profession in Bermuda; that he was appointed Attorney-General of Bermuda in June, 1861, and had ever since held that office; that he was elected a member of the House of Assembly of Bermuda in 1856, and had continued a member of it ever since. He became Mr. Chapman's professional adviser in 1858, and was so until his death. He then deposed fully to the preparation of the draft of the will from the instructions of the testator, given at several interviews with him between January and July, 1883. On June 18 the draft was completed, and he went through the substance of each clause with the testator, and it was satisfactory to him. Having himself engrossed the will from this draft, he went with it to the testator on July 11, 1883. He then read the will to him clause by clause, and when the testator asked for explanations of technical expressions or the effects of certain provisions he gave them to him, and he was perfectly satisfied that the testator understood the nature and purport of every clause in the will. Having finished reading the will, he told Mr. Chapman he would require two witnesses, and Mr. Chapman went out on the verandah, and he heard him call two names to persons in the front yard. Two young men came upstairs who were strangers to him, but whom he since knew to be Alfred Stewart Perry and Gustavus Barron Griset. They came into the drawing-room where he and Mr. Chapman were, and he said to them, "Mr. Chapman wishes you to witness his will." He then deposed to Mr. Chapman having signed the will in the presence of himself and those two witnesses, and that they signed the attestation in the presence of each other and of Mr. Chapman.

The attesting witness Perry was examined by Mr. Golinsky as a witness for the appellant. He said in his evidence that when he came into the house Mr. Gray asked him to sign a paper—to remember what it was as it was Mr. Chapman's will; that Mr. Gray asked him to try and get some one else; that he went to Mr. Chapman's front gate, and Griset happened to be

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passing, and he asked him if he would come in, and he did. He then said Mr. Gray again told him to remember what he was going to sign—it was Mr. Chapman's will; he signed a paper, and Griset signed also. He was asked by Mr. Golinsky, "Did you see the said Samuel Chapman sign the said paper?" and answered, "No, sir."

Now, it is very improbable that Mr. Gray, who must have perfectly known what was necessary for the validity of the will, would have taken Mr. Chapman's signature to it before the witnesses came into the room, or that Mr. Chapman, having been told that witnesses were necessary, would have signed it before they came in. Their Lordships are unable to believe this answer. The witness was examined more than ten years after the transaction. In his cross-examination by Mr. Gray, he was asked how he came to witness the will if he did not see Mr. Chapman sign it, and he answered, "Because at that time I did not understand the nature of a will." It may be that, not knowing what was necessary, he did not observe Mr. Chapman signing, or that his memory is imperfect. Or he may have been prepared for the question, and had it suggested to him what to answer. He admitted in cross-examination that he had an interview with Mr. Golinsky and Mrs. Pilkington, and that about a month after he left his employment at the dockyard at Bermuda, and shipped on board a vessel of which Mr. Golinsky was the master. But the witness went further. Being shewn at the end of his examination by Mr. Golinsky the will of which probate had been granted, and asked, "Did you sign that signature, 'A. S. Perry,' to that document?" he replied, "No, sir." If this be true, Mr. Gray must have obtained probate of a will of which the signatures of the witnesses are forged, and the testator's also—as it is not credible that Mr. Chapman had signed two wills. Their Lordships cannot believe this answer of Perry. There appears to them in this and other parts of his evidence to be ground for the opinion of the Bermuda Court that he had been tampered with on behalf of the appellant.

The other witness, Griset, was not examined, and it was necessary for the respondents to explain this. A witness named Pitt was called by them, who deposed that he was the

brother-in-law of Griset; that the latter was a purser in a steamship trading between New York and the West Indies, and had been out of Bermuda several years, and had only visited Bermuda three times for from one to four days on each occasion since he left it in 1889. The respondents applied for the issue of a commission to examine him on oath, and the Court refused it on the ground that it had no power to issue such a commission. The application was made on an affidavit of Mr. Reginald Gray, the second respondent, who is a solicitor, that he had made efforts to procure Griset's attendance in Bermuda, but he insisted on the payment of a sum of money for his coming to Bermuda to give evidence which was considerably in excess of what the respondents thought reasonable and just, and they did not feel justified in acceding to his terms. There is, in their Lordships' opinion, a sufficient explanation of his evidence not being taken. It also affords some reason for the delay in bringing the case to trial.

Upon the question whether the testator was competent to make a will, the evidence in support of it was that of the respondent, Mr. S. B. Gray, who deposed that when he took the general instructions for the will he tested the testator's memory with regard to his property and other matter before he spoke to him about the will. He had gone at his request to talk to him about his will. He knew that he had had a recent illness, the nature of which he was not aware of. He found that his memory was quite clear; he was most distinctly of testamentary capacity at that time. He would have had no hesitation in transacting any business whatsoever with him, or taking his signature to any document however important. On July 11, when the will was executed, he found him in much the same state as on the former visits; he was certainly on that occasion of testamentary capacity. James Bell Heyl, a druggist, who had known the testator from the time when he came to Bermuda to the time of his death, deposed that he visited him seven times at his request between January, 1883, and his death; on each of those occasions he conversed with him for hours, and never saw anything wrong about his mental state; he seemed worried sometimes; on the occasions referred

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to he conversed on general subjects, and was quite capable of transacting business; he never saw any signs of mental decay in him. The Rev. F. J. F. Lightbourn, rector of the parish of St. George, Bermuda, where the testator had resided for some years before his death, deposed that he frequently visited him; he had known him before he came to St. George's; his acquaintance with him increased after he came to live there, and he saw him frequently during the last year of his life at his own house. From his intercourse with him during the last few years of his life he should take him to be a man of sound mind; he saw nothing to make him think differently. When he saw him in March, June, and early in July, 1883, if he had been called on to witness a will made by him, he should have considered him capable of executing it. Andrew Greig, who was in the testator's employ at the time of his death, in charge of his stores in Water Street, St. George's, and had been in his employ for upwards of five years, deposed that he saw him frequently during the last few months of his life, pretty nearly every day; he transacted his own business, as far as the witness knew, up to the time of his death. From the time he entered Mr. Chapman's employ up to the time of his death he did not notice any signs of mental decay in him; his mind was quite clear during the last few months of his life; he never knew it to be otherwise.

The evidence for the appellant upon the unsoundness of mind was that of Mrs. Chapman, the widow. She deposed that from her husband's actions during the time they resided in Bermuda she concluded that he was of unsound mind; that she had known him incapable of transacting business for some months before his death. But she said she never consulted a doctor about it, and when shewn in cross-examination a letter dated September 3, 1889, purporting to be from her to Mr. S. B. Gray, in which is this passage, "As to the state of Mr. C.'s mind when he made his will, as she was not there in St. George's, she knows not how he was, but she does know that when she last visited him his mind was clear and bright enough to receive her most affectionately, and whenever she visited him he always received her in his usual manner, without

any appearance of lunacy, and why not when he made his will?" she said it was her writing. What had occurred between September, 1889, and June, 1893, when she was a witness, to account for what she then said, is not apparent. The other witnesses upon this matter were Perry; Mary Ann Bell, his mother, who said she had worked for some months for Mr. Chapman in the store; Cross, a stonemason, who had worked for him, but who said he had left his employ entirely about a year or two before he died; and Luckenbach, who became acquainted with him in 1878, and saw him for the last time in the autumn of 1882; and Mrs. Pilkington, the appellant. Their evidence is not of any value on this question, nor are the several letters which were referred to by the learned counsel for the appellant. It would be difficult, indeed, to present to any court a weaker case against the competency of a testator than the present one. The testator may have been an eccentric man. The Court of Bermuda thought that he was, and their Lordships do not differ from that view; but eccentricity alone does not prevent a man from disposing of his property by will. The Lower Court has made a decree according to the prayer of the respondents' bill of complaint, and their Lordships will humbly advise Her Majesty to affirm it and to dismiss the appeal. The appellant will pay the costs.

Their Lordships direct that the original documents in the case be returned to the Court from whence they came.

Solicitors for appellant: *T. L. Wilson & Co.*
Solicitors for respondents: *Parker, Garrett & Holman.*

[PRIVY COUNCIL.]

J. C.* 1899 March 9, 10; May 3.

MINISTER FOR LANDS . . . . . APPELLANT;

AND

HARRINGTON AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown Lands Acts, 1884, *s.* 102; 1895, *ss.* 10, 11, 13—*Application for Additional Conditional Purchase—Respondent barred under one Act, in Time under the other.*

Under the Crown Lands Act, 1884, the land in suit had was reserved for a public purpose by notification on July 4, 1896.

On January 9, 1897, the notification was revoked, and it was notified in the *Gazette* of that day that it was set apart for homestead selections under ss. 10 and 13 of the Crown Lands Act of 1895:—

Held, that the respondent's application on February 11, 1897, to take the land as an additional conditional purchase, though within the forty days of grace prescribed by s. 11 of the later Act, was nevertheless barred as having been made before the expiry of the sixty days' delay prescribed by s. 102 of the Act of 1884.

Colless v. *Minister of Lands*, [1899] A. C. 90, followed.

APPEAL from a decision of the Supreme Court (Nov. 4, 1897) on a special case stated by the Lands Court under s. 8, sub-s. 6, of the Crown Lands Act of 1889.

The facts of the special case and the proceedings in the Land Courts are stated in the judgment of their Lordships.

Swinfen Eady, *Q.C.*, and *V. Hawkins*, for the appellant, contended that the Supreme Court was wrong in holding that the provision in s. 11 of the later Act was inconsistent with s. 102 of the earlier Act, and must therefore be held pro tanto to repeal it. They referred to *Colless* v. *Minister of Lands* (1), and contended that the principle there laid down, namely, that

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY.

(1) [1899] A. C. 90.

s. 11 only preserves existing rights and confers no new right, was applicable to and decisive of the present. Sect. 11 only preserved such right (if any) as the respondents might have to apply for the land within forty days from the date of the setting apart notification, and did not confer any new right. It is not in any way inconsistent with s. 102 of the earlier Act. That section applies to a totally different case. Under that section the land in suit was not available for sale until sixty days had expired from the date of revoking its reservation to a public purpose. During those sixty days the respondents have no legal right to apply for a conditional purchase of such land; for such application is a statutory proceeding, which if valid would vest in them a title to the land from the date of the application: see s. 12, sub-s. 1, of the Crown Lands Act of 1889, and *Minister of Lands* v. *Bolton*. (1) The application was invalid on February 11, 1897, for the sixty days had not expired. It would be invalid on any other date, for after the expiry of the sixty days the respondent would be barred by the forty days' limit of time under the other Act. In other words, he could gain no statutory right of application under either notification.

A. R. Butterworth and *Sargant*, for the respondents, contended that by virtue of s. 8, sub-s. 6, of the Act of 1889 the decision of the Supreme Court appealed from was "conclusive," the word used in the sub-section cited, and that no appeal lay to Her Majesty in Council. As to the right of appeal, see *Théberge* v. *Laudry* (2); *Moses* v. *Parker*. (3) As to the meaning of the word "conclusive," see, besides *Théberge* v. *Laudry*, *Lyon* v. *Morris* (4); *Garnsey* v. *Flood*. (5)

On the merits they contended that the land in suit was not temporarily reserved from sale within the meaning of s. 102 of the Act of 1884. Moreover, the prohibition in s. 102 against sale of the lands during sixty days does not also prohibit an application during that period to purchase. So long as the acceptance of the offer or the grant of the application

(1) (1896) 17 N. S. W. L. R. (C.L.) 389.
(2) (1876) 2 App. Cas. 102.
(3) [1896] A. C. 245.
(4) (1887) 19 Q. B. D. 139.
(5) [1898] A. C. 687.

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takes place after the sixty days have expired the transaction is effective. Moreover, on the true construction of s. 102 it does not apply to a conditional purchase or sale within the meaning of the Crown Lands Acts. It only prohibits sale in the ordinary sense. If, on the contrary, the terms of s. 102 are applicable to the respondents' case, it should be held that the force of the section is overriden and rendered of no effect by ss. 10 and 11 of the Act of 1895, by virtue of which the application in question was valid. Otherwise, in all cases where the revocation is published on the same day as the notification under the Act of 1895, the effect would be, by postponing the application for sixty days, to render it invalid under s. 11 of the latter Act; so that, notwithstanding the provisions of that section, those lands could never "become available for the purpose of an application for an additional conditional purchase." It was submitted that the intent and object of the Legislature clearly were by the Act of 1895 to enable the holder of an original conditional purchase of land adjoining the land included in the notification to increase his holding by promptly applying for an additional conditional purchase of part of the land so included; and that by the construction contended for by the appellant that intent and object would be defeated. They distinguished *Minister for Lands* v. *Colless* (1), and asked that *Minister for Lands* v. *Bolton* (2) should be overruled.

Swinfen Eady, Q.C., in reply, was heard only on the question of jurisdiction to entertain the appeal, and referred to *Garnsey* v. *Flood* (3), and *Re Barbour*. (4)

Butterworth also referred to *Goldring* v. *La Banque d'Hochelaga* (5), and *Cushing* v. *Dupuy*. (6) [Their Lordships overruled the objection.]

1899 *May* 3.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The respondent Harrington is the owner of a conditional purchase, and the other respondents are his

(1) (1897) 18 N. S. W. L. R. 91; [1899] A. C. 90.
(2) 17 N. S. W. L. R. 389.
(3) [1898] A. C. 687.
(4) (1891) 12 N. S. W. L. R. 90.
(5) (1880) 5 App. Cas. 371.
(6) (1880) 5 App. Cas. 409.

mortgagees. They presented separate appeals in the Land Appeal Court, but their interests are identical, and they unite in resisting this appeal by the Minister for Lands. The appeal is presented to contest an answer given by the Supreme Court on a special case, which in effect affirmed the right of the respondents to take up as an additional conditional purchase land adjacent to Harrington's conditional purchase.

The material transactions with their dates of time may be stated briefly. On July 4, 1896, the land in dispute was reserved by notification for a public purpose. On January 9, 1897, that notification was revoked by a notification which added that the land was not to be sold until the expiration of sixty days from that date. This addition was unnecessary, because the sixty days' delay is prescribed by s. 102 of the Crown Lands Act of 1884. But it was doubtless made to remind the public of that provision. On the same January 9, 1897, in the same *Gazette* it was notified that the land was set apart for homestead selections under ss. 10 and 13 of the Crown Lands Act of 1895. On February 11, 1897, the respondents lodged an application to take the land as an additional conditional purchase.

The Local Land Board, and on appeal the Land Appeal Court, disallowed the application, on the ground that, being made before the expiry of sixty days from January 9, 1897, when the reservation for public purposes was revoked, it was not a valid application.

The Land Appeal Court then stated a case for the opinion of the Supreme Court. The question submitted was as follows:—

"1. Whether under the circumstances herein-before set forth the said Joseph Harrington was entitled under s. 11 of the Crown Lands Act of 1895 to take up as an A. C. P. or C. L. the land set apart for the purposes mentioned in s. 10 of the said Act notwithstanding that 60 days had not elapsed from the date of the revocation of the reservation mentioned in paragraph 2 hereof."

The learned judges of the Supreme Court, three in number, returned an answer which so far as material was in the following

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terms. Darley C.J. is speaking of the Crown Lands Act of 1895. He says:—

"By s. 11 it is provided that a notification that Crown Lands are set apart 'shall not operate to prevent the lands situate within the tract or area so set apart being or becoming available for the purpose of an application for an additional conditional purchase or a conditional lease of a series of which the original conditional purchase was made before the date of the notification, in any case where the application is made not later than 40 days after the date of the notification.' The application has to be made within 40 days of the notification, and not 40 days from the date specified in the notification as the date when the land becomes available for homestead selection. The 40 days therefore, in this case run from the 9th January. Prior to the 9th January this land had been reserved from sale, and on that date a notification was published in the *Gazette* revoking the reservation. It is not necessary to decide whether the word 'sale' in s. 102 of the Act of 1884 includes a conditional sale and conditional lease. For the purpose of this decision, I will assume that it does. The provision in that section that the lands shall not be sold until after the expiration of 60 days from the revocation of the reserve is got rid of by the provision in s. 11 of the Act of 1895, which provides that the application may be made within 40 days. The provision in the latter Act is clearly inconsistent with the former Act, and therefore must be held to override it. I am of opinion that s. 11, so far as it gives the right to apply for an additional conditional purchase or conditional lease during the 40 days after the notification, does pro tanto repeal the provision in s. 102 which prevents the application being made until after the lapse of 60 days. The application having been made within 40 days was a good and valid application, and should have been given effect to.

"The question submitted to us will be answered in the affirmative, and the appeal upheld with costs."

That is the judgment appealed from, and their Lordships must express dissent from it. The 102nd section of the Act of 1884 and the 10th and 11th sections of the Act of 1895 have

different objects. The former Act is dealing with land which, after being temporarily reserved from sale, has been released from that reservation; and it provides that such land shall not be sold for sixty days after the release. The latter Act is dealing with land set apart under powers given by s. 10 for holdings of specified kinds, and thereupon rendered unavailable for holdings of other kinds. In that case s. 11 provides that the notification under s. 10 shall not operate to prevent the land becoming available for certain applications (of which the application of the respondents is one) if made within forty days. But though the respondents are for forty days relieved from the bar created by the notification which set the land apart for homestead selections, there is nothing to relieve them from the bar created by the fact that the land had been temporarily reserved from sale. They were under two restrictions, one to endure for sixty days from January 9, 1897; the other avoidable for forty days after January 9, but afterwards to endure permanently. Their Lordships are at a loss to see any contradiction between these two provisions.

A few days after the decision of the Supreme Court in this case it fell to their Lordships to decide the case of *Colless* v. *Minister for Lands*. (1)

In that case the appellant held a conditional purchase, and he applied for a conditional lease of adjacent land on January 23, 1896. The land had been leasehold area of a pastoral holding. On December 18, 1895, it was notified to be set apart for settlement leases. The application therefore was made within forty days of that notification. But it was not until January 25, two days after the application, that the notification was published which had the effect of turning the land from its condition of leasehold area when it would not be available for conditional lease, into that of resumed area when it would be so available. The Supreme Court decided that Colless' application on January 23 was not competent, and their Lordships affirmed that decision. They cannot distinguish that case from the present one. Though the causes of disability are different in the two cases, the applicant was in each of them disabled

(1) [1899] A. C. 90.

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by two causes, one subject to the grace of forty days accorded by s. 11 of the Act of 1895, and the other not so subject. And it was held that s. 11 operated only upon the disability imposed by s. 10, and did not give any right to any one who is not in a position to make application when s. 10 is brought into operation.

With regard to the point which the Supreme Court found it unnecessary to decide owing to the view which they took of the point just disposed of, their Lordships see no reason to doubt that in providing that land released from a temporary reserve shall not be sold for sixty days, the Legislature intended to say that the interest of the Crown should not be disposed of for pecuniary consideration in the ways which the reservation had precluded. It would be an undue and rather fanciful restriction of the meaning of the provision to suppose that it does not apply to a conditional sale, but must mean a completed sale of the absolute interest.

On the question whether an appeal to the Queen in Council is competent, their Lordships do not think it necessary to add anything to the observations made during the argument. They will humbly advise Her Majesty to declare that the question put in the special case ought to have been answered in the negative, and that the appeal from the Land Appeal Court to the Supreme Court should have been dismissed with costs. The respondents must pay the cost of this appeal.

Solicitors for appellant: *Light & Galbraith.*
Solicitors for respondents: *Douglas Norman & Co.*

[PRIVY COUNCIL.]

In re THORNYCROFT'S PATENT.

J. C.*
1899
Jan. 27;
Feb. 25.

Petition for Prolongation—Novelty consisting in the Combination—Absence of unusual Merit—Losses referable to want of Business Skill.

Where letters patent had been granted for "improvements in steam generators," and it was shewn that the invention consisted of the combination of various parts all or most of which were admittedly not new at the date of the letters patent; an extension was refused in the absence of evidence that the invention was of unusual merit.

Where patentees had incurred losses, these cannot be regarded as evidence of inadequate remuneration if attributable to unskilfulness in conducting their business.

THIS was a petition by John Isaac Thornycroft and John Donaldson for an extension for fourteen years or other term of letters patent dated January 31, 1885, for an invention of "improvements in steam generators." It related to improvements in water-tube boilers in which two horizontal water cylinders, one on each side of the fire grate, are connected by means of numerous small tubes, with the upper part of a horizontal steam cylinder, which is placed at a higher level, and by means of larger tubes with the lower part of the same cylinder. It consisted mainly in the arrangement and disposition of the small connecting tubes in such a manner that the tubes themselves form the principal walls of the fire grate and control and direct the path of the gases from the fire grate to the chimney, the small tubes being connected in such a manner to the three cylinders that the flow of the mixed hot water and steam shall be in a direction from the lower cylinders to the upper cylinder in all of them, and the larger tubes being connected in such a manner that the water in the upper cylinder is reconducted to the lower cylinders, whereby a much more perfected circulation is obtained than could be obtained in any form of water-tube boiler known at the date of the said letters patent.

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

J. C. 1899 THORNYCROFT'S PATENT, *In re.*

Moulton Q.C., and *J. C. Graham*, for the petitioners, contended that the invention was of great utility, and particularly applicable to marine machinery. By means of it a greater horse-power could be obtained than formerly with a smaller weight of boilers and of fuel. A more perfect circulation being obtained, a higher efficiency of heating surface equivalent to a larger heating surface is secured, with corresponding economy of coal. By this and by the arrangement of the outer rows of tubes, so as to form water walls which necessarily limit the temperature of the radiating surface to that of the water, the use of heavy refractory non-conducting materials is avoided, and a great saving in the weight of the boilers is obtained. Naval architects and engineers doubt new forms of boilers, and delay adopting them, and consequently the invention has not until recently come into any extensive commercial use. It was contended that the accounts shewed that a fair remuneration, commensurate with the great public value and importance of the invention, had not been obtained.

The Attorney-General (*Sir R. Webster*), and *Sutton*, for the Crown, contended that this was not a great or remarkable pioneer invention. No witness from the Admiralty or any great shipping company had spoken to its practical importance In estimating the remuneration, the heavy loss incurred in reference to the *Speedy* ought not to be taken into consideration. The onus was on the patentee, and he had not shewn on the face of his accounts that his remuneration had been inadequate, having regard to the merit of the invention.

1899 *Feb.* 25.

The reasons for their Lordships' report were delivered by

LORD DAVEY. This is an application for an extension of the term of certain letters patent dated January 31, 1885, and granted to John Isaac Thornycroft for "improvements in steam generators." The invention has reference to what are known as water-tube boilers, and consists of the combination of various parts, all or most of which were admittedly not new at the date of the letters patent. It is no doubt a useful invention, particularly in marine engines, and has been applied with success both in this country and abroad. It has been used in

vessels of the Royal Navy in which high speed is required with small weight of boilers and of fuel to be carried in the vessel. But the evidence has not satisfied their Lordships that the invention is one of such striking or unusual merit as would justify them in recommending an extension of the term of the patent. The only evidence on this point, in addition to that of the patentee himself, is that of Professor Capper, who speaks of the boiler as the best of its kind for certain purposes. He is, no doubt, a gentleman of competent skill and knowledge, but his evidence on a point of this kind has not the same authority as that of a naval architect or constructor might have had.

The evidence as to the remuneration of the patentee is also unsatisfactory. In the opinion of their Lordships, the petitioners fail to give any sufficient explanation why they have not or might not have received adequate remuneration for the invention. The petitioners have received a net profit of 5826*l.* 5*s.* 4*d.* on their foreign patents. They have also made a profit of 3178*l.* 10*s.* during the years from 1888 to 1895 inclusive on boilers made by them in this country for boats not built by them, being at the rate of about 16 per cent. on the expenditure. But they state that they have lost 6494*l.* 7*s.* in fitting the patented boilers on boats built by themselves under contract. They have built between thirty and forty boats fitted with the patented boilers, from the year 1885 to the year 1896, at an expense of 480,686*l.* In particular they state that in the year 1891 they lost a sum of 38,226*l.* 8*s.* 9*d.* on a vessel called the *Speedy*, which they built for the British Admiralty, and they attribute 4970*l.* 13*s.* of the loss to the boilers. In this and other cases the petitioners have taken the percentage of loss on the boat, including the boilers, and divided it pro ratâ between the actual cost of the boilers and that of the boat, exclusive of the boilers. It appeared, however, on cross-examination that the tenders for the *Speedy*, as well as for some other vessels, contained separate prices for the boilers and for the boat, and the difference between the contract price and the actual cost of the boilers of the *Speedy* was 688*l.* only. Their Lordships think that the proportion of loss attributed to the

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boilers is ascertained on a fallacious principle, but, in the circumstances of this case, they do not find it necessary to dwell on these details. No explanation whatever has been offered why this large loss (nearly 10 per cent. on the amount expended) was incurred in building boats fitted with the patent boilers for themselves, while a handsome profit was made on supplying the boilers for boats built by other builders. In the absence of any explanation the facts proved are consistent with the existence of some error of judgment, miscalculation, or other defect in the petitioners' mode of carrying on their business of boatbuilding, and their Lordships cannot accept the evidence as proof that no profit was or could have been made in working the patented invention.

They will, therefore, humbly advise Her Majesty that the prayer of the petition be refused.

Solicitors for petitioners: *Tatham & Lousada.*
Solicitor for the Crown: *The Treasury Solicitor.*

[HOUSE OF LORDS.]

SHARP (OFFICIAL RECEIVER) . . . APPELLANT.

AND

JACKSON AND OTHERS . . . . . RESPONDENTS

H. L. (E.)
1899
June 15.

Bankruptcy—Fraudulent Preference—Conveyance to make good Breaches of Trust—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52) *s.* 48.

A trustee, who had committed breaches of trust and was insolvent, on the eve of his bankruptcy conveyed an estate to make good the breaches of trust, without any pressure or request by his cestuis que trust :—

Held, that there was no fraudulent preference within s. 48 of the Bankruptcy Act, 1883, the debtor's object being to shield himself from the consequences of his breaches of trust.

The decision of the Court of Appeal (*New, Prance & Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19) affirmed.

C. C. PRANCE, member of a firm of solicitors practising at Evesham, being trustee, committed breaches of trust by paying trust moneys into his firm's banking account instead of investing them duly. On March 29, 1894, Prance, knowing that his firm had long been insolvent, executed a deed whereby he conveyed the Longdon Hill estate belonging to him to a trustee on trust to raise moneys and rectify the breaches of trust. The deed recited the breaches of trust and expressed that it was executed in order to shield Prance from liability to proceedings. None of the beneficiaries were aware of the deed or of the breaches of trust. During February 1894 Prance deposited certificates of shares belonging to his firm in a box with a memorandum that the certificates were deposited as security for moneys due to some of the trust estates in respect of which breaches had been committed. The box remained in Prance's custody till his bankruptcy. None of the beneficiaries knew of the breaches of trust or the deposits. On March 31 Prance's firm filed a petition, and were afterwards adjudicated bankrupt. The trustee in bankruptcy brought an action

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against Prance and other persons interested in the trust estates, claiming (inter alia) a declaration that the deed and the deposits were void as against the plaintiff, and that the Longdon Hill estate and the deposited shares were the property of the plaintiff. The action was tried without a jury before Vaughan Williams J., who gave judgment for the defendants. (1) This decision was affirmed by the Court of Appeal (Lord Esher M.R., A. L. Smith and Chitty L.JJ). (2) The present appeal was brought by the trustee in bankruptcy. The terms of the deed are set out in the reports below; it is not necessary to repeat them here.

Sir R. Finlay S.-G. and *Muir Mackenzie* (*R. Harington* with them) for the appellant. The point taken below that the deed was revocable is not now insisted on, and the only question in the present appeal is whether there was a fraudulent preference. There was evidence that Prance intended to prefer certain creditors to others, namely, the fact that the draft deed was prepared two years before it was executed and altered at the last moment to meet the latest decisions; and that certain trust estates were chosen, omitting others. The debtor had a free choice and voluntarily preferred some persons to others. Though it was held in *Ex parte Taylor* (3), followed in *Ex parte Ball* (4), that the relation of debtor and creditor does not exist between a trustee and his cestui que trust, so that a voluntary payment to a trust estate cannot be a fraudulent preference within s. 48 of the Bankruptcy Act, 1883, those decisions are wrong and should be overruled. A cestui que trust is a creditor of his defaulting trustee and could prove in the bankruptcy. The real question is was there any pressure on the debtor? If not, the preference was free and voluntary: *Tomkins* v. *Saffery*. (5) It is admitted that there was no pressure here: the preferred creditors knew nothing of the transaction. It is not enough to shew that the debtor was in fear of criminal proceedings or other personal danger. The

(1) [1897] 1 Q. B. 607.
(2) [1897] 2 Q. B. 19.
(3) (1886) 18 Q. B. D. 295.
(4) (1887) 35 W. R. 264.
(5) (1877) 3 App. Cas. 213, 225.

words of s. 48 are "with a view" of giving a preference: therefore if the debtor acted with mixed views and part of the view or intention was to put one creditor in a better position than another, there is a fraudulent preference. His "view" or intention is one thing; his "motive" may be another: see *In re Fletcher, Ex parte Suffolk* (1); *In re Bell.* (2) Whatever Prance's motive may have been his "view" or intention was to benefit certain creditors; he must be taken to have intended the consequences of his acts.

[They also referred to *Ex parte Stubbins* (3); *Ex parte Bolland* (4); *Ex parte Griffith* (5); *Ex parte Hill* (6); *Ex parte Tempest.* (7)]

Upjohn, Q.C. and *Van Neck* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, I confess I am unable to entertain any doubt about the true decision in this case. It appears to me that the first thing one has to do in dealing with this matter is to deal with the question of fact. Certainly this instrument, which was executed two days before the bankruptcy, is an instrument which not unnaturally exposes itself to the inquiry—what were the reasons why it was executed? So far as I am concerned, I entirely and absolutely agree with the view as to the question of fact on which this case was decided by the Court of Appeal. Lord Esher says (the construction of the statute I will deal with presently): "The question whether there has been a fraudulent preference depends, not upon the mere fact that there had been a preference, but also on the state of mind of the person who made it. It must be shewn not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be

(1) (1891) 9 Morrell's Bank. Cas. 8.
(2) (1892) 10 Morrell's Bank. Cas. 15.
(3) (1881) 17 Ch. D. 58, 69.
(4) (1871) L. R. 7 Ch. 24.
(5) (1883) 23 Ch. D. 69.
(6) (1883) 23 Ch. D. 695, 700, 703.
(7) (1870) L. R. 6 Ch. 70.

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taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend. The recitals in the deed seem to me to shew what was really his object. It appears to me obvious that he was not actuated by any feeling of bounty towards those in whose favour the deed was made, but was doing what he did for his own benefit. He wanted to render those particular persons disinclined to proceed to extremities against him. He knew that what he had done must be discovered very shortly, and those persons had a hold upon him, because, if they chose to proceed against him, the consequences to him might be very serious. He thought that if he put them as far as he could into the same position as if he had not committed the breaches of trust, that might go in mitigation of the consequences to himself. It seems to me clear, therefore, that he made this conveyance not with the 'intention' or 'view' or 'object' or whatever it may be called of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances, what he did is not a fraudulent preference within the Bankruptcy Act." A. L. Smith L.J. says: "It appears to me that this case is really covered by the decision in *Ex parte Taylor* (1), where the facts were identical with those of the present case with the exception that there appears to have been in that case an actual threat of proceedings, whereas in the present case, though there seems to have been no threat of proceedings, Prance knew perfectly well that his breaches of trust must be discovered almost immediately, and that proceedings would certainly be taken against him in respect of them. The pressure upon him in either case is about identical." Chitty L.J. says: "I ask myself what was really the view which Prance had in making this conveyance" (it must be observed that the Lord Justice there uses the word "view" in the sense in which I myself have used it during the argument). "Was it to prefer these particular trust estates to other creditors? The answer to that question must, I think, be in the negative. It was to protect himself against the charges hanging over him."

(1) 18 Q. B. D. 295.

My Lords, that being the state of facts, the question comes back to what is the true construction of the statute which your Lordships have to construe; and, speaking for myself, I should hesitate very much to differ from the opinion I have already during the argument quoted from Lord Cairns, uttered certainly without any dissent from any other member of your Lordships' House, in the case of *Butcher* v. *Stead*. (1) What the learned Lord said upon this subject was: "The Act, however, did not profess to express the existing law without making considerable changes in it. In the case of fraudulent preference, for example, in place of raising an inquiry whether it was done in contemplation of bankruptcy, the Act provided certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts, as they became due, from his own moneys, and that he should become bankrupt within three months from the date of payment. The Act appears to have left the question of pressure as it stood under the old law; and, indeed, the use of the word 'preference,' implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used."

My Lords, I entirely assent to that view of the construction of the statute, and it appears to me that the construction for which the Solicitor-General and Mr. Muir Mackenzie have contended would impute absurdity to the Legislature. Nothing could have been easier than to have enacted, if they had thought proper to do so, that any preference to one creditor over another creditor, or any greater advantage—I do not want to use the word "preference," because questions may arise as to the true construction of that word itself—but any advantage given by previous payment to one creditor, to which advantage all the other creditors were not a party, should of itself be a preference which should be void under the statute. Nothing, I say, could have been easier than to have made such an enactment, if that was intended; but, in my opinion, no such intention is to be gathered from the statute. On the contrary, as Lord Cairns said, subject to certain express alterations which it then made in the previous state of the law, it did intend to bring with it

(1) (1875) L. R. 7 H. L. at p. 846.

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all those conditions which, certainly, for something more than a century, have been imputed to these transactions, which must be regarded as fraudulent under the bankruptcy law—because the policy of the bankruptcy law was that upon a cessio bonorum the whole of the creditors should be equally treated; and the state of the law from that time until the present, I think, has not been a subject of doubt.

I know that what A. L. Smith L.J. has said with regard to what I might call the pressure upon a man's own mind, that he was not by his own voluntary act preferring one creditor to another, but was thinking of something else, has been contested at the Bar; but no authority in favour of that contention has been quoted, and there is an authority now not less than a century old, in fact 110 years old, in which that question was actually determined, and, so far as I know, it has never been disputed since. In that case, *Thompson* v. *Freeman* (1), what happened was this: "The defendant had in the year 1780 joined in two bonds with the bankrupt, and had received a counter-bond of indemnity. When these bonds became due, the bankrupt, not having wherewithal to discharge them, applied again to the defendant, and engaged him to join with her in two new bonds, payable in July 1784, for the purpose of raising money to take up one of the old bonds; one of them was accordingly taken up the 14th January 1784. The defendant took another counter-bond of indemnity upon his joining in the two last bonds. Previous to the 3rd June 1785, the day on which the act of bankruptcy happened, the bankrupt sent for the defendant and proposed to him that he should take out his debts in goods, to which he acceded, and the warrant of attorney in question was given. It appeared that her reason for sending for the defendant originated from a letter taking notice, though not in a threatening way, of her situation with respect to the defendant, which letter she had received just before from Messrs. Fosset & Bellamy, whom she knew to have acted in a former transaction as attorneys for the defendant, though upon this occasion they were not in fact concerned for him."

(1) (1786) 1 T. R. 155.

Just let us see what the facts were in that case. There was no threat and no application for payment of the debt coupled with anything which involved legal procedure or anything of the sort, but as a matter of fact the bankrupt in her own mind, from a mistaken sense of what was going to be done, thought that legal proceedings were going to be taken; and the assumption of the Court is that it was that mistake that induced her to do the thing. Lord Mansfield says: "A bankrupt when in contemplation of his bankruptcy cannot by any voluntary act favour any one creditor; but if, under fear of legal process, he gives a preference, it is evidence that he does not do it voluntarily." There is the principle stated—it is not a voluntary act; and, as Lord Cairns says, the word "preference" here imports in it the voluntary act of a person who can do either the one thing or the other as he prefers. Lord Mansfield proceeds: "And though the defendant in this case had taken no steps to secure himself, in case he was called upon, yet the bankrupt, acting from mistake, was under the same apprehensions of legal process as if the defendant had actually *threatened* her; so that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be."

My Lords, it seems to me that after that decision, which, as I say, has now lasted more than a hundred years, and has never, so far as I know, been controverted or qualified, it is idle to suggest that you must have an actual threat or the actual pressure of a creditor. Applying the principle laid down by Lord Mansfield to the facts in this case, it is true that no one had threatened this particular bankrupt with criminal proceedings; but if the facts are such as each of the Lords Justices in turn described them to be (and as to that I entirely concur), that what was in his mind was this, that when the examination in bankruptcy took place he would as a matter of fact probably be prosecuted and sent to penal servitude for an act of misconduct of which he had been guilty, is not the belief and apprehension of such a criminal prosecution in the same position as the mistaken fear on the part of the debtor which was commented upon by Lord Mansfield,

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that process would issue against the bankrupt unless she had done the thing she did? If what the Legislature had in view was the exercise of a voluntary right on the part of debtors to do what they pleased, the mere voluntary deciding (I will not use the word "preferring") to pay one creditor and leave another creditor unpaid, if that is really what the Legislature intended to prohibit by positive enactment, then can it be said that it was a mere voluntary decision on the part of this particular bankrupt that he would favour one set of creditors rather than the other, when in truth and in fact it was an endeavour to save himself from a criminal prosecution which induced him to do the act in question? It becomes then no longer a voluntary act, but an act under pressure—pressure not the less because it is pressure upon his own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of creditors to assert their rights.

My Lords, it becomes unnecessary to raise other questions which have been disposed of before. It has been suggested that there was a proposition which could be maintained, as to which I confess I entertain grave doubts whether any decision goes to that extent, namely, that the relation between a cestui que trust and a trustee who has misappropriated the trust fund is not that of debtor and creditor. That it may be something more than that is true, but that it is that of debtor and creditor I can entertain no doubt. As that question has been mooted and brought before your Lordships' House as one question for decision here, I certainly have no hesitation in saying that in my opinion no such proposition can properly be maintained, and that although there are other and peculiar elements in the relation between a cestui que trust and a trustee, undoubtedly the relation of debtor and creditor can and does exist.

My Lords, it is admitted that the question upon the securities deposited must follow the same rule as is now enunciated in respect of the deed executed two days before the bankruptcy; therefore I give no separate judgment upon that.

Upon the whole, my Lords, I am of opinion that the appeal

ought to be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I quite agree with what was said by Lord Cairns in *Butcher* v. *Stead* (1) in the passage cited by my noble and learned friend. I think the question of pressure is left precisely as it was under the old law, and I think the word "preference" in itself involves and imports a free choice. Now I do not think that this gentleman at the time when he executed this deed was in a position to exercise a free choice. He was under an overwhelming sense of imminent peril. The fact that two years before he had had this deed prepared shews that he had a sense of his dangerous position before his mind at that time; and at the last moment, when it became certain that he would be exposed to bankruptcy and all its consequences, including the examination that would follow, he executed the deed. I think he executed it simply with the view of protecting himself. I doubt whether he had any intention of preferring creditors. I think he only regarded himself. If he regarded the creditors at all it was only with a very secondary view.

My Lords, the case seems to me to be clear, and I am glad to find that the stream of authority on this subject is so uniform and consistent.

LORD MORRIS. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I also am of opinion that the judgment of the Court of Appeal should be adhered to, and I prefer the grounds upon which the Court of Appeal have put their judgment to those of Vaughan Williams J. It seems to me that by a stream of authority it has now been settled, whatever may have been the case a number of years ago, that it is necessary to consider, as A. L. Smith L.J. said, what was the dominant or real motive of the person making the preference; and I think the dominant or real motive which led to the granting of this deed was that the bankrupt intended to

(1) L. R. 7 H. L. 839, 846.

H. L. (E.) 1899 SHARP v. JACKSON.

protect himself. I think that was the true purpose he had in executing it.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 15, 1899.

Solicitor for appellant: *Solicitor, Board of Trade.*

Solicitors for various respondents: *M. H. Prance, for Mann & Rodway, Trowbridge; Rowcliffes, Rawle & Co., for Prance & Prance, Plymouth; Richard White, for F. Treasure, Gloucester; Schultz & Son, for G. E. Garrard, Evesham.*

[HOUSE OF LORDS.]

H. L. (E.) 1899 *June* 16.

JOHN BATT & CO. . . . . APPELLANTS;

AND

DUNNETT AND ANOTHER (TRADING AS JAMES CARTER & CO.) AND THE COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS . . . . . RESPONDENTS.

Trade-Mark—Registration—Non-user and no bonâ fide Intention to Use—Expunging.

A trader is not entitled to register a trade-mark for goods in which he does not deal and in which he has no bonâ fide intention of dealing. Registration under such circumstances may be expunged.

The decision of the Court of Appeal, *In re John Batt & Co.'s Registered Trade-marks*, [1898] 2 Ch. 432, affirmed.

IN 1882 Kottgen, trading as John Batt & Co., registered a trade-mark for eleven classes including Class 42 (the food class). In 1888 he registered another trade-mark for Class 42 only. James Carter & Co. having applied to register a somewhat similar trade-mark for Class 42 in respect of cereals, the Comptroller-General refused the application. James Carter & Co. then moved to expunge the registration. Romer J. held

upon the evidence that John Batt & Co. had never at any time dealt in goods in Class 42 and had not at the time of registration any bonâ fide intention of doing so, and ordered that the registration of both trade-marks be expunged as to goods in Class 42, and this decision was affirmed by the Court of Appeal (Lindley, Chitty, and Collins L.JJ. (1)).

Levett Q.C. and *Sebastian* for the appellants. The two trade-marks were properly registered, in accordance with the statutory provisions, as the appellants' property. The Acts authorize the registration of trade-marks without previous user, and impose no condition of actual user after registration. If the mark was at any time likely to be used by the registered owner, though in fact it should never be used, perhaps for forty years, the mark may still be kept on the register. Once registered the mark may remain on the register. There is nothing in either Act which makes mere non-user a ground for removal. If the owner of a mark has a business in which it can be used, he is entitled to have it kept on the register. The Courts below drew wrong conclusions from the evidence. These marks were registered with the bonâ fide intention of using them in respect of the class to which they are assigned, and the respondents are not entitled to have the marks removed in order to obtain registration of similar marks which have been used only for a month or two, if at all. The registration was regular and operative, and the Court had no jurisdiction under the Acts to order the removal from the register.

Neville Q.C. and *Austen-Cartmell* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, whatever may be the ultimate decision on the abstract proposition as to whether or not there can be a keeping back for a long time of a trade-mark which originally was bonâ fide intended to be used, but which from accident or some other cause has not been used, I purpose giving no opinion upon it at present for this reason, that it does not arise in this case.

(1) [1898] 2 Ch. 432.

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Here is a gentleman who for seventeen years has been in possession of a trade-mark. There are a variety of circumstances which can be suggested—that it was needed for the purpose of trading under a particular form of mark, and so protecting the trade which he had either begun or intended to begin, or that he was disposed to register any number of trade-marks for the purpose of vending them to others to whom they might appear as pleasant and attractive trade-marks. Again, as to that I propose to say nothing, because, although certainly I am not without an impression on the subject, it may be that the irritability which Mr. Levett has attributed to his client put him at a disadvantage, and that he did not give sufficient explanation of circumstances which certainly would suggest he was a dealer in trade-marks, and not a dealer in, say, rice.

Be that as it may, the question we have to deal with is whether we are prepared to disagree, as a matter of fact, with the learned judges, one of whom saw and heard the witness, and has recorded his opinion in plain terms that the witness was unsatisfactory, and that he did not rely on any of those vague statements which he made. The learned judge drew the inference which he expressly states, namely, that in his view there was not a bonâ fide intention to trade at all, and that the trade-mark ought to be erased accordingly. The Court of Appeal—giving, as they ought to do, weight to the learned judge who in dealing with a matter of fact has seen and heard the only witness who was put forward to give evidence on the matter which alone was relevant to the cause, and I think concurring with the general view of Romer J. in what he had said about the witness—came to the same conclusion; and the only question for your Lordships is whether we are going to disagree with the Court of Appeal and the learned judge who saw and heard the witness. For my own part I entirely concur with the judgment they formed, and I think, even without the advantage of seeing and hearing the witness, I should come to the same conclusion on the shorthand writer's note of the evidence. But, as I say, it is enough for me to say that, considering the advantage the learned judge had in seeing the witness, even if I did not follow him, as I certainly do, in point

of fact, I should hesitate to differ from him. He had a better opportunity of forming a judgment than I can possibly have.

My Lords, when once the fact is arrived at that the witness upon whom the affirmative lay was not to be relied on, and absolutely declined to answer questions or be cross-examined upon the matter he was called upon to explain, I am of opinion that no Court of law could act on the evidence of such a witness.

Under these circumstances I move your Lordships that this appeal be dismissed with costs.

LORDS MACNAGHTEN, MORRIS, and SHAND concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 16, 1899.

Solicitors for appellants: *Shepheards.*
Solicitors for respondents: *Mann & Taylor.*

[HOUSE OF LORDS.]

LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE . . . . . } APPELLANTS;

AND

THOMAS LAW & CO. . . . . RESPONDENTS.

LA "BOURGOGNE."

Admiralty—Practice—Jurisdiction—Service of Writ—Foreign Corporation carrying on Business in England—Agent—Officer—Order IX. r. 8.

A foreign corporation which does business in England in such a way as to be resident here may be sued here, and the writ may be served on its officer here.

The decision of the Court of Appeal, [1899] P. 1, affirmed.

THE appellants were a French company formed under French law with its head office in Paris, and owned steamers trading

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between French ports and English ports and other places. The company were lessees and paid the rent of an office in London where their name was painted up. There Fanet acted for them and other companies and also did business on his own account. As "Agent Général" for the appellants Fanet (inter alia) secured freight and passage engagements, collected freight and transmitted it to the company, paid dues, and forwarded and delivered goods carried by the company. He was paid by commission, with a minimum guarantee. He also occupied as tenant an office in Liverpool of which the company paid the rent. The terms of his contract with the company are set out in the report of the Court below.

A collision having happened between the company's vessel, *La Bourgogne*, and a vessel of the respondents, the respondents brought an action in the Admiralty Division against the company, and served the writ upon Fanet. The appellants having moved to set aside the writ, Sir F. Jeune dismissed the motion. The Court of Appeal (A. L. Smith and Collins L.JJ.) affirmed this decision. (1)

By Order IX. r. 8, "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . . ."

Joseph Walton Q.C. (*F. Laing Q.C.* and *Balloch* with them) for the appellants. Two questions arise: (1.) whether a foreign company can be sued at all here: (2.) whether if so there has been a proper service of the writ in this case. The respondents rely on *Newby* v. *Van Oppen* (2), where Blackburn J. went on the ground that the American company did its own business in this country. So in *Haggin* v. *Comptoir d'Escompte de Paris*. (3) That is not the case here: the business transactions of the company here are done by Fanet, acting not as an officer, or clerk, but as an agent simply. The terms of his contract with the company shew this. He did no more than

(1) [1899] P. 1. (2) (1872) L. R. 7 Q. B. 293, 295.
(3) (1889) 23 Q. B. D. 519.

an ordinary ship's broker, and he did the like for other companies, and carried on business on his own account. Service on such a person is not a good service within Order IX. r. 8: he is not a "mayor or other head officer," or a "town clerk, clerk, treasurer, or secretary of such corporation." Manifestly that order was not intended to apply to foreign corporations such as this: see per Collins L.J. in the Court of Appeal. This is a company which must be sued in France if at all: our law recognises no companies except those formed according to English law. Independently of that larger question it is enough to say that service on a mere agent is bad: see *Walter Nutter & Co.* v. *Messageries Maritimes.* (1)

Cohen Q.C., *Butler Aspinall Q.C.*, *A. E. Nelson* and *H. S. Henriques* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, I must say I am surprised that so much time has been occupied in discussing what is admitted to be a question of fact, and one which, I think, may be disposed of within very narrow limits.

I observe that in one of the authorities quoted, Bacon V.-C., with that broad common sense which not infrequently distinguished that learned judge's observations, said, in a similar case, *Lhoneux, Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation* (2): 'They hire an office, write up their name, and beyond all question stamp upon themselves and upon their place of business here the assumption that here they carry on their business." It appears to me that as a consequence of these facts the appellants are resident here in the only sense in which a corporation can be resident—to use the phrase which Mr. Joseph Walton has so constantly referred to, they are "here"; and, if they are here, they may be served.

This is, as I have said, a question of fact—it is admitted to be so; and I have nothing to add to what all the learned Lords Justices in the Court of Appeal have said upon the subject with considerable diffuseness. It appears to me to be established beyond all doubt that in this case the writ was

(1) (1885) 54 L. J. (Q.B.) 527. (2) (1886) 33 Ch. D. 446.

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properly served and upon the proper person. Therefore I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I concur.

LORD SHAND. My Lords, I think we have had a very able argument from Mr. Walton in this case. I have only to say that so far as I am concerned it is sufficient for the judgment that we have the fact that this company was carrying on business on its own premises, and had announced that it was carrying on business on its own premises by having its name in a most prominent position over the doors. I have no doubt whatever that the case has been rightly decided.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 16, 1899.

Solicitors for appellants: *Ince, Colt & Ince.*
Solicitors for respondents: *Lowless & Co.*

[HOUSE OF LORDS.]

THE EARL OF GOSFORD . . . . . APPELLANT;

AND

THE IRISH LAND COMMISSION . . RESPONDENTS.

H. L. (I.)
1899
June 19.

Practice—Appeal—Jurisdiction—Appeal to House of Lords from Interlocutory Order of Court of Appeal in Ireland—Appellate Jurisdiction Act 1876 (39 & 40 *Vict. c.* 59) *ss.* 3, 12—*Supreme Court of Judicature Act* (*Ireland*) 1877 (40 & 41 *Vict. c.* 57) *s.* 86.

No appeal lies to the House of Lords from an interlocutory order of the Queen's Bench Division in Ireland, or from an order on appeal therefrom made by the Court of Appeal in Ireland.

IN an action, *Reg.* (*at the prosecution of the Earl of Gosford*) v. *The Irish Land Commission* (1), brought in the Queen's Bench Division, Ireland, Crown side—upon a motion to make absolute a conditional order for a writ of certiorari to remove into that Court for the purpose of being quashed certain orders of the Irish Land Commission, and for a mandamus to the Commission to rehear certain applications—the Queen's Bench Division made an order discharging the conditional order. Upon appeal from that order, the Court of Appeal in Ireland made an order affirming the order below and dismissing the appeal. From these two orders of the Queen's Bench Division, Crown side, and the Court of Appeal the Earl of Gosford filed a petition of appeal to this House. The Irish Land Commission, respondents, then petitioned to have the appeal dismissed as incompetent. The matter having come before the Appeal Committee, it was ordered by the House that the petition to dismiss should be argued by one counsel of a side.

The McDermot Q.C. (Irish Bar) for the respondents. By the Appellate Jurisdiction Act 1876 s. 3 an appeal lies to this House "from any order or judgment . . . . (1.) of Her Majesty's Court of Appeal in England; and . . . . (3.) of any Court

(1) [1899] 2 I. R. 399.

H. L. (I.)
1899
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in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute." When that Act passed no appeal lay by common law or statute to the House of Lords from an order made in Ireland by a common law court on interlocutory motion (or on appeal therefrom), although an appeal did lie from interlocutory orders in Chancery to the Court of Appeal in Chancery and thence to the House of Lords. By s. 12 of the Act of 1876 "Except in so far as may be authorized by orders of the House of Lords an appeal shall not lie to the House of Lords from any Court in . . . . Ireland in any case, which according to the law or practice hitherto in use, could not have been reviewed by that House, either in error or on appeal." No orders have been made by this House with respect to such appeals, and therefore the law and practice remain as before. By the Supreme Court of Judicature Act (Ireland) 1877 s. 23 the jurisdiction of the Exchequer Chamber was vested in the Court of Appeal. By s. 86 all judgments or orders of the Court of Appeal shall be subject to appeal to the House of Lords in the cases and under the conditions in and under which "the like judgments or orders" of the Court of Appeal in Ireland or Exchequer Chamber in Ireland would have been subject to appeal to the House of Lords if this Act had not been passed, or as may be directed by any Act of Parliament affecting the appellate jurisdiction of the House of Lords. No such Act has been passed, and there is therefore no appeal in cases like the present. Those two Acts of 1876 and 1877 only preserved the existing rights of appeal and did not extend them. The question whether any appeal lay in such cases as the present was discussed in *Nieroth* v. *Boileau* (1) and Lord Herschell L.C. and Lord Watson reserved their opinion. It is said that the Judicature Act has fused common law and equity, and that there is no such thing as a common law Court or common law cause of action. That fallacy was refuted by the Earl of Halsbury L.C. in *Sadler* v. *Great Western Ry. Co.* (2) The Courts are distinct, and the practice is distinct. [He also referred to the opinion of Palles C.B. against the right of

(1) (1886) 20 Ir. L. T. 57. (2) [1896] A. C. 453.

appeal, in *Reg.* v. *Runciman* (1); to *Scott* v. *Bennett* (2) as to error not lying from a decision pronounced on motion; and to *Mellish* v. *Richardson* (3); also to 13 & 14 Vict. c. 89 s. 30; the Common Law Procedure Amendment Act (Ireland) 1853 ss. 166, 170; the Common Law Procedure Amendment Act (Ireland) 1856 c. 102 ss. 38, 40, 41, 42, 49, and the Chancery Appeal Court (Ireland) Act 1856 c. 92 ss. 8, 14.]

Ronan Q.C. (Irish Bar), for the appellant. The old practice in Ireland was as has been stated, but the intention of the Legislature was that the practice should be the same in England and Ireland: see ss. 23, 24, 61 of the Irish Judicature Act 1877. There being an appeal from interlocutory orders of the Court of Chancery there must be the like appeal from orders of common law courts, for wherever there is any conflict or variance between the rules of equity and the rules of the common law the rules of equity are to prevail: s. 28 sub-s. 11: otherwise there is no real fusion as intended. If the respondents' contention is right the appellate jurisdiction of the House of Lords is chaos. The Appellate Jurisdiction Act 1876 s. 11 says error shall not lie to the House of Lords. But s. 65 and the second paragraph of s. 86 of the Irish Judicature Act 1877 provide for certain proceedings in error from the Crown side of the Queen's Bench Division. The first paragraph of s. 86 gives the right of appeal; the case is covered by the words "the like judgments or orders." [He also referred to 30 & 31 Vict. c. 114 s. 76, and 40 & 41 Vict. c. 56 s. 36, as to transfers of suits, and to *Hedley* v. *Bates* (4) as to prohibition and injunction.]

EARL OF HALSBURY L.C. My Lords, your Lordships are indebted to the learned counsel who has very clearly argued all that was susceptible of argument, and perhaps occasionally suggested some points which were not quite susceptible of argument. The result of it I think cannot be doubted. There can be no doubt that there was not any power to bring up an interlocutory order of a common law court by way of appeal to

(1) (1889) 28 L. R. Ir. 550.
(2) (1871) L. R. 5 H. L. 234, 242.
(3) (1832) 1 Cl. & F. 224.
(4) (1880) 13 Ch. D. 498.

H. L. (I.) 1899 EARL OF GOSFORD v. IRISH LAND COMMISSION. Earl of Halsbury L.C.

this House, and that the mode in which that can be done at present is by specific legislation in respect to England. There is no such specific legislation with regard to Ireland, and therefore the law remains as it was. There is nothing that has been brought before us that shews that there would be any power of bringing up an interlocutory order from the Court of Queen's Bench, or that which acted as the Court of Appeal, using the word rather loosely—the Court of Exchequer Chamber in Ireland. That being the condition of things, it seems to me to be hopeless to argue that because the word "like" is used, therefore you are to make a likeness between two things between which there is no congruity or similitude of any sort or kind, and say that because it is a like order it may be brought up.

The difficulty in the way of the learned counsel insisting upon a right of appeal appears to me to be a very simple one. He admits, with the candour which has distinguished his whole argument, that before the particular epoch he referred to there was no such right of appeal, and that no such interlocutory order could be brought up here. That being admitted, the question is whether there is any statute or any rule to which he has been able to point your Lordships which enables it to be brought up now. He has wholly failed in doing that, and the result must be therefore, I think, that your Lordships are called upon to give judgment that no such appeal lies.

LORDS MACNAGHTEN, MORRIS and SHAND concurred.

Appellant's petition and appeal dismissed as incompetent with costs.

Lords' Journals, June 19, 1899.

Solicitors for respondents: *Nicholl, Manisty & Co.*
Solicitors for appellant: *Boxall & Boxall.*

[HOUSE OF LORDS.]

SKINNER . . . . . APPELLANT;

AND

THE NORTHALLERTON COUNTY COURT JUDGE AND OTHERS . . . } RESPONDENTS.

H. L. (E.)
1899
June 22.

County Court—Bankruptcy—Jurisdiction—Order made in exercise of Bankruptcy Jurisdiction—Certiorari.

Certiorari does not lie to bring up an order of a county court judge made when exercising bankruptcy jurisdiction.

The decision of the Court of Appeal, [1898] 2 Q. B. 680, affirmed.

THE appellant, a solicitor, being in embarrassed circumstances left his home on April 12, 1898. On April 25 a petition in bankruptcy was presented against him. On May 17 an order was made by the county court judge sitting in bankruptcy for the issue of a warrant of arrest, and on May 19 a warrant was issued to arrest the appellant reciting that it had been made to appear to the satisfaction of the Court that there was "probable reason to suspect and believe" that the appellant was "avoiding examination in respect of his affairs and was otherwise delaying or embarrassing the proceedings in bankruptcy against him." An order nisi, having been made for a certiorari to remove into the Queen's Bench Division and quash the above order and warrant on the ground of want of jurisdiction, was afterwards discharged by Wright and Darling JJ., and this decision was affirmed by the Court of Appeal (A. L. Smith, Rigby, and Vaughan Williams L.JJ.). (1)

Horridge and *R. Adkins* for the appellant. Certiorari lies for two reasons. First because the debtor absconded before the bankruptcy petition was presented, and the Bankruptcy Act 1883 s. 25 sub-s. 1 (*a*), as amended by the Bankruptcy Act 1890 s. 7, empowers the Court to issue a warrant for

(1) [1898] 2 Q. B. 680.

H. L. (E.) 1899 SKINNER v. NORTHALLERTON COUNTY COURT JUDGE.

arrest only where the petition is presented before the debtor absconds or prepares to abscond. Secondly because the warrant is bad on the face of it. It ought to have alleged (following those sections) that there was probable reason for believing that the appellant had absconded for one of several purposes. The warrant says nothing about absconding, and says there was reason to suspect (which is no ground) that he was avoiding examination and delaying &c., none of which are grounds for arresting a debtor unless he has absconded or is about to abscond for those purposes. The warrant must follow the statutory jurisdiction. It is true that ss. 92–100 of the Act of 1883 give a county court sitting in bankruptcy the powers of the High Court, and that s. 102 sub-s. 2 says that it shall not be restrained "in the execution of its powers" by the order of any other Court, but here the county court was exceeding its powers, and certiorari is a common law right where jurisdiction has been manifestly exceeded or the liberty of the subject illegally interfered with.

[They also referred to *In re New Par Consols* (*No.* 2) (1); *James* v. *South Western Ry. Co.* (2) (prohibition to the Admiralty though a superior Court); *Colonial Bank of Australasia* v. *Willan.* (3)]

Sir R. Finlay S.-G., *Muir Mackenzie* and *Erle Richards* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, it seems to me that this is a very plain case, and I am somewhat surprised that it should have been brought here, because it seems to me that the judgments below are perfectly satisfactory, and depend upon very plain principles.

The county court in question is a county court which has bankruptcy jurisdiction, and had it at the moment when the order was made; although no bankrupt was there at the time nor for some time afterwards, still it had a bankruptcy jurisdiction. Then this particular bankrupt had a bankruptcy petition

(1) [1898] 1 Q. B. 669. (2) (1872) L. R. 7 Ex. 287.
(3) (1874) L. R. 5 P. C. 417.

presented against him, and the Court, having bankruptcy jurisdiction, was seized of that bankruptcy proceeding. Thereupon what is done is within the jurisdiction of that Court, and not within the jurisdiction of any other Court. If it were a county court proceeding, properly so called, there is a section in the County Courts Act which, even in respect of those county courts which have not a bankruptcy jurisdiction, prohibits the issue of a certiorari in terms, except as mentioned in the Act. (1) I am not for the moment concerned with that, although that would dispose of the matter by another process. But, as a matter of fact, in respect of bankruptcy the statute has given all the powers and jurisdiction which the High Court possesses to a county court sitting in bankruptcy.

Now, this county court judge was sitting in bankruptcy, and the confusion which is imported into it is that because, as I will assume for the moment, the judge issued a warrant which in form was wrong, but could have been put right, therefore it could have been put right, not in the Court in which it was issued, but in the High Court. The absurdity of that is that the statute itself has made the county court the High Court for this purpose. You might just as well argue that a warrant, defective in form, issued by the Court of Queen's Bench could be set right by certiorari. Of course that is absurd. This is the High Court for this purpose. If the warrant was ever so bad, it was issued by a bankruptcy judge in respect of bankruptcy proceedings which were before him, of which he was seized—a warrant which he had perfect jurisdiction to issue. If there was any irregularity or inaccuracy in point of form in the warrant that did issue, that could be put right by proper proceedings, but the proper proceedings would be in that Court itself, and not proceedings by certiorari in the Court of Queen's Bench.

My Lords, that appears to me abundantly clear, and it would be wasting time to proceed further than to say that the judgment of A. L. Smith L.J. seems to me to put the matter perfectly clearly, and I have no desire to add anything to what he said.

(1) See County Courts Act 1888 (51 & 52 Vict. c. 43) ss. 124, 126.

H. L. (E.) 1899 SKINNER v. NORTHALLERTON COUNTY COURT JUDGE.

LORDS MACNAGHTEN, MORRIS, SHAND, and BRAMPTON concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 22, 1899.

Solicitors for appellant: *Sismey & Sismey, for Skinner, Son & Church, Sunderland.*

Solicitor for respondents: *Solicitor to the Board of Trade.*

[HOUSE OF LORDS.]

H. L. (E.) 1899 *July* 24.

BRYANT . . . . . APPELLANT;

AND

WILLIAM HANCOCK & CO., LIMITED RESPONDENTS.

Lease, Construction of—Covenant—"Discontinuance" of Licence.

The lessee of a public-house covenanted to conduct the business so as to afford no ground for "discontinuing the licence":—

Held, that read with the context "discontinuing" meant not refusing to renew but forfeiting the licence.

The decision of the Court of Appeal, [1898] 1 Q. B. 716, affirmed.

THIS appeal turned entirely on the construction of obscurely-drawn covenants in a lease. The point was not now argued which was decided in the Court of Appeal and there reported, namely, that in the covenants by the lessees for themselves and their assigns the word "assigns" did not include an under-lessee.

The following statement of facts is taken from the judgment of Lord Macnaghten.

By lease dated October 16, 1874, the late Robert Bryant, who was plaintiff in the action, and is now represented by the present appellant, demised certain licensed premises known as the Princess Royal, situate in what is now the county borough of Cardiff, to one John Biggs, a brewer in a large way of business, for twenty-one years from September 1, 1874. The lease contained certain covenants intended to protect the licences attached to the premises, but there was no covenant

against assignment or underletting. On March 31, 1890, Biggs assigned the premises to the respondents for the residue of the term granted by the lease of 1874.

In April, 1891, one Mary Evans—who was then in occupation of the premises, apparently under an underlease granted by the respondents or their predecessor in title and was the licence-holder—was convicted of the offence of permitting drunkenness on the premises. After the conviction the licence attached to the house was transferred in special sessions to her son, Morgan Evans. At the next annual licensing sessions for the borough of Cardiff the chief constable objected to a renewal of the licence to Morgan Evans on the ground of the conviction of the former licensee, and the conviction of four men for being drunk on the premises on the occasion when the offence of which she was convicted was committed. In consequence of this objection the justices refused a renewal, and the licence dropped. The dropping of the licence was a serious loss to the respondents as well as to Mr. Bryant. The respondents endeavoured to obtain a renewal, but their efforts were everywhere unsuccessful.

The question on this appeal was whether the respondents had committed a breach of the covenants contained in the lease for the protection of the licence attached to the Princess Royal.

There were three distinct covenants, or, to speak more accurately, three distinct parts of one covenant bearing on the question and binding upon the respondents as assigns of Biggs. The covenant was to the effect (1.) that the covenantor and his assigns would "keep the premises open every lawful day, and conduct the business in a proper and orderly manner, so as to afford no ground or pretence for discontinuing the licences thereof"; (2.) that they would not "wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public-houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licences for sale of beer and ale, wine and spirituous liquors therein"; and (3.) that they would "from time to time during the continuance of the term of the

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lease apply for, and do or cause to be done, all and whatsoever should be requisite for obtaining the renewal of such licences."

In an action brought by Bryant against the respondents for damages for breaches of covenant, tried before Lawrance J., the jury found a verdict for the plaintiff for 5300*l.*, and judgment was entered accordingly. The Court of Appeal (Earl of Halsbury L.C., A. L. Smith and Collins L.JJ.) set aside that judgment, and entered judgment for the defendants. (1)

July 4. *Abel Thomas Q.C.* and *W. Tudor Howell* for the appellant.

Warmington Q.C. and *B. F. Williams Q.C.* (*Arthur Lewis* and *S. T. Evans* with them) for the respondents.

Abel Thomas Q.C. in reply.

The House took time for consideration.

July 24. LORD MACNAGHTEN (after stating the facts). My Lords, the Court of Appeal held that there had been no breach at all of the first part of the covenant. They considered that that part related to the forfeiting of an existing licence as distinguished from a refusal to renew. As regards the second part of the covenant, they held that the respondents had not wilfully done or suffered anything which could be a reasonable ground for the justices refusing to renew. As regards the third part of the covenant, they held upon the evidence that the respondents had done all in their power to obtain a renewal, but without avail.

On the appeal before your Lordships there was not much argument as regards the third part of the covenant. It was admitted by the learned counsel for the appeal, who argued the case very ably and very fairly, that unless fault could be found with the respondents for supporting the application of Morgan Evans, who was said to have been serving at the bar when the offence for which his mother was convicted occurred, they had done everything that could be done to obtain a renewal, and more than could reasonably be required of them. It was not shewn that they could have put forward anybody but Morgan Evans, and there is nothing to suggest that anybody else would

(1) [1898] 1 Q. B. 716.

have had a better chance of obtaining a renewal. The fact that the licence was transferred to him seems to shew that there was no objection to him on personal grounds. It was indeed contended that the covenant "to do or cause to be done all and whatsoever should be requisite" for obtaining a renewal was an absolute covenant that a renewal should be obtained. But that seems an extravagant contention.

The main argument before your Lordships was directed to the first and second parts of the covenant. It is quite clear that the word "wilfully" governs the word "suffer" as well as the word "do," and it cannot be contended on the facts of the case that the respondents wilfully did or wilfully suffered anything which could be considered a breach of the licensing laws and regulations, or a reasonable ground either for forfeiture or non-renewal. But it was said that the first part of the covenant was not pointed to forfeiture, or, at any rate, that it was not confined to forfeiture. It was urged that the expression "discontinuance of a licence" is just as applicable to non-renewal as it is to forfeiture. That may be so, and indeed I am inclined to think that the expressions "discontinuing" a licence, "withdrawing" a licence, and "withholding" a licence, which for some inscrutable reason the parties to the lease of 1874 chose to use in preference to the simple words of the Legislature, may without any strain of language be applied indiscriminately to a case of forfeiture and a case of non-renewal. But I think there is force in the argument of the Court of Appeal to the effect that it would be unreasonable to hold that the first part of the covenant, which is unqualified, and the second part, which is qualified, both cover one and the same thing; and thinking as I do that the second part of the covenant points clearly to non-renewal, it seems to follow that the first part must be directed to forfeiture. The second part of the covenant is to the effect that the covenantor and his assigns will not "wilfully do or suffer any act or thing which may be a breach of the rules and regulations established by law for the conducting of licensed public-houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licences." It seems pretty clear that that part of the covenant does not point to forfeiture. Forfeiture is consequent

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only on a breach of the law. There cannot be a reasonable ground or any ground for forfeiture which does not involve a breach of the law. The second limb of the clause would, therefore, be idle and unmeaning if the clause were held to be directed against forfeiture. But, inasmuch as renewal is a matter of discretion, there may well be a reasonable ground for a refusal to renew without any breach of the law. If, for example, a licensed person closed his house at such times and seasons as might be calculated to cause inconvenience to the public, it might well be that such conduct would be a reasonable ground for non-renewal, although it would be no breach of the law. So, if a licensed person set up another public-house in the immediate neighbourhood and obtained a licence for it, it might well be that the justices on reconsidering the matter might refuse to renew the licence of the original premises, though there had been no breach of the licensing laws.

It seems to me, therefore, that the second part of the covenant points to non-renewal, and consequently I think it is only reasonable to hold that the first part of the covenant points to something different and is aimed at forfeiture.

It was for the plaintiff to make out that there had been a breach of covenant on the part of the respondents. In my opinion, he failed to do so. I therefore move your Lordships that this appeal be dismissed with costs.

LORD MORRIS. My Lords, I concur.

LORD SHAND. My Lords, I have found the decision of this case to be attended with much difficulty. It was evidently the purpose of the lessor to secure himself against the loss of the licence, which was a main element in the value of the property, and to make his tenant responsible should the licence be lost during the currency of the lease by his fault or the fault of his servants or sub-tenants, for whose acts in the conduct of the business the tenant became responsible.

I agree in thinking the contention that there was an undertaking absolute in character that the licence should be in existence at the close of the lease is unsound. It is hardly conceivable that a tenant should undertake such an obligation

when it is borne in mind that licences are frequently not renewed owing entirely to local circumstances, such as the view of the justices that the number of houses in a given area is too great and should be diminished, and I am clearly of opinion that no such absolute undertaking by the tenant as is contended for was given. The terms of the whole provision having for its purpose to protect the licence are certainly loose and wanting in precision, though the general intention is very clear, and the greatest difficulty is introduced by the circumstance that for some acts or neglects the tenant is to be responsible only if his conduct has been wilful, while for others wilful acting or neglect is not necessary. The whole clause is framed with an absence of art, skill, or method, the same stipulations are, I think, repeated more than once, and I doubt whether justice is done to these stipulations as a whole by splitting the clause into parts and treating each separate part as confined to dealing with a separate matter, one part with forfeiture only and another with conduct leading to a refusal to grant a renewal of the licence, in place of taking the clause as one in which repetitions occur applicable to the same events. I confess the leaning of my opinion is rather in favour of Lawrance J.'s view that there was a breach in the failure of the tenant to conduct the business "in a proper and orderly manner so as to afford no ground or pretence for discontinuing the licences," and that "discontinuing the licences" is an expression which would cover non-renewal, and it might be forfeiture also. But having regard to the unanimous decision of the Court of Appeal and to your Lordships' views now expressed, I do not propose to differ from the judgment moved by my noble and learned friend on the Woolsack.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 24, 1899.

Solicitors for appellant: *Bower, Cotton & Bower, for Stephens, David & Co., Cardiff.*

Solicitors for respondents: *Riddell, Vaizey & Smith, for Joseph Henry Jones, Cardiff.*

[HOUSE OF LORDS.]

H. L. (E.) 1899 Aug. 3.

SMITH AND OTHERS . . . . . APPELLANTS;

AND

RICHMOND (SURVEYOR OF TAXES) . . . RESPONDENT.

Revenue—Rating—Market Garden—Glass-houses—"Agricultural Land"—Agricultural Rates Act, 1896, *c.* 16, *ss.* 1, 5, 6, 9.

Glass-houses in or on a market garden, if buildings, must under the Agricultural Rates Act, 1896, be rated as buildings and not as agricultural land.

The decision of the Court of Appeal, [1898] 1 Q. B. 683, affirmed.

THIS appeal raised the question stated in the head-note. The special case and the arguments on both sides are set out at length in the report below (1), and a brief but sufficient account of the whole matter is given in the Lord Chancellor's judgment.

March 23, 24. *Asquith Q.C.* and *Clavell Salter* for appellants.

Sir R. E. Webster A.-G. and *S. H. Day* (*Arthur H. Trevor* with them) for respondent.

Salter in reply.

The House took time for consideration.

Aug. 3. EARL OF HALSBURY L.C. My Lords, this appeal raises the question what is meant by the words "occupier of agricultural land" in the statute 59 & 60 Vict. c. 16.

Apart from the provisions of the statute in question, the word "land" would be variously understood by different persons. To a farmer the word "land" would not mean his farm buildings; to a lawyer the word would include everything that was upon the land fixed immovably upon it; but the statute has given an interpretation clause, and has also in the enacting clause itself pointed out, not obscurely, with what subject-matter it was dealing. The very enacting part of it

(1) [1898] 1 Q. B. 683.

gives the antithesis between land and buildings, since the relief the occupier is to get is that he is to be liable in the case of every rate to which the Act applies "to pay one half only of the rate in the pound payable in respect of buildings and other hereditaments."

Now, the special case here finds that "the land" sought to be treated as agricultural land is of the character described in the 14th paragraph of the case as agreed to: "The said Robert Piper was a grower of fruit, vegetables, and flowers at Worthing, and described himself, and was commonly known, as a market-gardener and nurseryman. He was the owner and occupier of a piece of land rather more than four acres in extent on which *fifty-seven glass-houses or green-houses of various sizes were erected*; the houses were used by the appellant for the purpose of growing tomatoes, cucumbers, and grapes, and to a smaller extent other vegetables for the purpose of sale. The plants and crops grown therein were watered and heated by artificial means, and grown upon soil placed upon prepared beds inside the houses, and matured much earlier than in the open ground. The vines are planted inside the houses, and the roots run partly in the soil under the houses and partly pass through the apertures in the walls into the soil outside. Fifty-one of the glass-houses are thus used for growing vines. In the cucumber houses (which are six out of the fifty-seven houses) *there are, inside the houses, dwarf brick walls supporting corrugated iron sheets, upon which sheets earth taken from the other parts of the nursery ground is placed.* In this earth, so placed upon the iron sheets, the cucumber plants are planted. Beneath the iron sheets, and between them and the ground, there are hot-water pipes. *The area actually occupied by the fifty-seven houses is rather more than two acres. The rest (rather more than two acres) consists merely of vine borders, paths, and the stoke-holes. The whole of the houses were built upon dwarf brick walls like an ordinary green-house.*"

I have emphasized some parts of this description, but it is extraordinary that any claim should be made that what is here described is agricultural land. It would be quite as reasonable to claim that any building, however solid and substantial, used

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for agricultural purposes was agricultural land because to a lawyer land would include it, and as its use was agricultural, it therefore became agricultural land within the meaning of the Act.

I agree with the Master of the Rolls that the terms "land" and "buildings" in this Act are mutually exclusive of each other. I must say I feel no difficulty in applying the interpretation clause to the construction of the Act, which seems so plain. A market garden or a nursery ground may, as part of it, have agricultural land, and if such part is used as arable, meadow, or pasture-ground only, it will not forfeit its claim to relief because it forms part of such an industry; but in what sense can these buildings be described as arable, meadow, or pasture? They are buildings and not agricultural land at all.

I am very clearly of opinion that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON. My Lords, I have done my best to examine the statute in question, and I have been quite unable to arrive at any result other than that which is embodied in the Order under appeal. I agree with all the observations of the learned Master of the Rolls, and with the brief but cogent reasoning of my noble and learned friend the Lord Chancellor.

I concur in the judgment moved by the Lord Chancellor.

LORD MACNAGHTEN. My Lords, I concur.

LORD MORRIS. My Lords, I am of the same opinion.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, August 3, 1899.

Solicitor for appellants: *Herbert B. Bell.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

TEACHER . . . . . APPELLANT;

AND

CALDER . . . . . RESPONDENT.

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Contract—Agreement—Finality of Audit—Charges of Fraud—Costs.

The appellant advanced 15,000*l.* to the respondent, to be used in the business of the respondent for five years. In return for the advance the appellant was to receive interest and 37½ per cent. of the profits of the respondent's business. The contract stipulated that there should be an annual audit of the respondent's business by the firm of M. & Co., accountants, and that their certificate as to the profits should be binding on both parties. For four years the respondent's books were audited by G., a member of the firm of M. & Co. Subsequently the appellant raised this action against the respondent for a judicial account on the ground that the audits had not been in terms of the agreement in respect that the auditor did not know that his estimate of the profits was to be binding on the appellant and respondent. G. swore in his evidence that he did not know of this agreement, and that if he had he would have made out the account in a somewhat different form :—

Held, reversing the decision of the First Division of the Court of Session, that there must be a new account taken, the auditor being unaware that his audit was to be final between the parties.

APPEAL from a judgment by the First Division of the Court of Session, Scotland. (1)

The facts and arguments are sufficiently given in the judgment of Lord Watson.

Feb. 23, 24, 28; March 2. *Asher, D.F.*, and *Henry Johnston, Q.C.* (both of the Scottish Bar), heard for the appellant.

Balfour, Q.C., and *Salvesen* (both of the Scottish Bar), heard for the respondent.

[They cited *Collins* v. *Collins* (2); *In re Carus-Wilson and Greene* (3); *Johnstone's Trustees* v. *Johnstone.* (4)]

The House took time for consideration.

(1) (1898) 25 R. 661.
(2) (1858) 26 Beav. 306.
(3) (1886) 18 Q. B. D. 7.
(4) (1819) 19 Fac. Coll. 624.

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July 24. LORD WATSON. My Lords, upon April 11, 1889, a minute of agreement was executed between the late Adam Teacher, wine and spirit merchant in Glasgow, of the first part, and the respondent, James Calder, timber merchant, Glasgow, carrying on business there under the name or firm of Calder & Co., of the second part. The agreement on the narrative that the second party had applied to the first party for capital to be applied by him to extend and carry on his business as timber merchant, which the first party had agreed to give, in consideration of receiving the interest and share of profits or additional interest, in terms of the Act 28 & 29 Vict. c. 86, contained, inter alia, the following stipulations, which the parties bound themselves to observe :—

The first party agreed to advance in loan to the respondent, to be put by him as capital into his business of Calder & Co., the sum of 15,000*l.* between the 1st day of May and the 1st day of November, 1889. The first party also agreed to become cautioner to the Commercial Bank of Scotland, Limited, for 20,000*l.* to be advanced to the respondent for the purposes of his said business.

It was agreed that the respondent should pay to Mr. Teacher, in the first place, interest upon his loan of 15,000*l.* at the rate of 5*l.* per centum per annum, beginning the first annual payment at the term of Whitsunday, 1890; and, in the second place, by way of additional interest, such further sum as should be equal to 37½ per cent. of the net profits of the respondent's business of Calder & Co., under deduction at the rate of 5*l.* per centum per annum upon the capital of the respondent, and of any partner he might thereafter assume, and upon the said loan of 15,000*l.*, and also under deduction of the interest on the said bank credit or other interest, and on any addition to and accumulation of capital which under the provisions of the minute of agreement might be added thereto during the continuance of the said loan and bank credit, and also of the other charges and expenses of the business, and allowing a reasonable depreciation on plant, but not deducting anything for salaries to partners.

It was agreed that the books of Calder & Co. should be

balanced as on the 30th day of April, 1889, the day before the minute came into operation, and the respondent's capital in the stock and plant of the firm valued and ascertained. In the event of the first party being dissatisfied with the valuation, it was provided that the amount of the respondent's capital stock should be valued by two arbiters, with power to them to appoint an oversman in case of their differing in opinion. It was also provided that the respondent, in the event of his capital not amounting to at least 15,000*l.*, should put into the business a sum sufficient to raise the capital to that amount.

The fifth article of the minute, which relates to the ascertainment of the net profits of the business of Calder & Co. divisible between the first and second party, has formed the main subject of controversy in this appeal. It stipulates that—"The books of the said firm shall thereafter be balanced annually on the 30th April, and shall be audited by Messrs. M'Clelland, Mackinnon & Blyth, chartered accountants, Glasgow, or other auditors to be mutually agreed upon and appointed by both parties hereto, and the certificate of the auditors shall be binding on both parties as finally fixing the amount of the profits in each year, and the foresaid interest or percentage payable to the first party."

The minute was to continue in force for the term of five years, but either of the parties had right to bring it to a termination at the end of three years, upon his giving the other party six months' notice in writing prior to the 1st day of May, 1892. It was stipulated that the respondent, Mr. Calder, and any other partners that might be assumed by him into the firm of Calder & Co., should have power to draw interest on capital as well as on their share of the profits of the business, or might leave them in the business as capital, bearing interest at 5*l.* per cent. per annum, but that no capital should be withdrawn from the business so long as Mr. Teacher's loan was unpaid and his liability for the bank credit of 20,000*l.* undischarged. The minute also provided that, in the event of any disputes or differences arising as to the agreement between the parties thereto or their representatives in regard to the agreement, the business of Calder & Co., or the conduct or winding-up

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thereof, the same should be and were thereby submitted to the amicable decision, final sentence, and decree-arbitral of William Mackinnon, accountant in Glasgow, whom failing of Andrew Mackinnon, bank agent there, as arbiter in succession mutually chosen, whose decision or decisions, interim or final, should be conclusive and binding upon both parties.

After the minute of agreement was completed, Mr. Teacher called with it upon Mr. William Mackinnon, the leading member of the firm of accountants who had been appointed to audit the books of Calder & Co. He did not see Mr. Mackinnon, and called again at the office, when he had an interview with another partner, Mr. Robert Blyth, to whom he gave the minute of agreement, and, after discussing its terms with that gentleman, left it with him to be communicated to Mr. Mackinnon. Mr. Blyth on the same day made an abstract of the terms of the minute; and, according to his evidence, he gave back the minute to Mr. Teacher, and believes that he handed the abstract to Mr. Mackinnon on his return to the office. He says, "I had nothing more to do with the matter, and I took no more concern with it whatever." Nothing more is heard of the abstract, and it is not said or suggested that it was seen or read by any one in the office save Mr. Mackinnon, who died not long after he received it, until it was discovered among some other papers in the year 1894.

The parties to the agreement, the late Mr. Teacher and the respondent, Mr. Calder, understood and believed that the accountants, to whom they had entrusted the function of auditing the annual balance-sheets of Calder & Co., were cognisant of and would be guided by its terms in the discharge of their duty as auditors. Mr. Teacher had done all that he could to instruct them in the details of the agreement, and the respondent in his evidence states, "Mr. Teacher told me he had given the agreement to the auditors, and I understood he had given them instructions to attend to his interests in the audit," and again "I had learned from Mr. Teacher during that year that he had intimated the agreement to the auditors, and I took no further part in the matter."

The books of Calder & Co. were balanced as at April 30

in each of the years 1890, 1891, 1892, and 1893 by Charles D. Gairdner, who became a partner of the auditors' firm in the year 1888. Mr. Gairdner had been for some years previously a clerk of the firm, and he had been in use under the supervision of Mr. Blyth, who retired from the firm in 1891, to balance the books of the respondent, Mr. Calder. Mr. Gairdner when examined as a witness states, "From 1888 onward to 1893 I continued the audit of the books exactly on the same principle as I had conducted it prior to that date. I got no instructions whatever from any one to conduct the audit in any different way after 1889 from what I had done before. I have seen the agreement which was entered into between Mr. Teacher and Mr. Calder in 1889. The agreement itself I first saw late in 1894, but some time before that I had discovered in my office a memorandum in Mr. Blyth's handwriting containing a note of the particulars of the agreement. I discovered that entirely by accident—I think it must have been about the spring of 1894. Until I saw the memorandum I did not know what were the terms of the agreement between Mr. Calder and Mr. Teacher. Until I discovered the document No. 308 I was not aware there was any such agreement between Mr. Calder and Mr. Teacher."

Upon the completion of Mr. Gairdner's audits and upon his information his firm issued certificates in these or similar terms: "We have examined the foregoing balance-sheet and profit and loss account as at 30th April and compared them with the relative accounts in the ledger and found them correct." In the course of his employment Mr. Gairdner became aware from entries in Mr. Calder's private books, which he also audited, that Mr. Teacher had advanced the sum of 15,000*l.*; but he was not aware that Mr. Teacher had granted a cash credit for 20,000*l.* upon which his claim was postponed to the debt due by Mr. Calder to the bank. He had on the occasion of each audit numerous meetings with Mr. Teacher and Mr. Calder separately, and he learnt from them the extent of their interests respectively in the profits of Calder & Co., but neither of these gentlemen ever referred to the existence of an agreement or to its terms. In that statement Mr. Gairdner is

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corroborated by the respondent, who says, "I understood it" (i.e., the agreement) "was as well known in M'Clelland, Mackinnon & Blyth's office as my own, and that every member of the firm knew all about it." Unfortunately the belief of Mr. Calder as to the firm's knowledge of the agreement, which he shared with Mr. Teacher, was not justified by the fact. The accountant who made the audit was a member of the firm, but he was not aware of the terms of the agreement, and he did not know that, in accordance with the fifth article, his audit was to be final and binding upon both the parties. So far as he knew, he was merely employed by the parties to make a professional audit for their mutual convenience, and he had no reason to suppose that if they or either of them were dissatisfied with his determination upon any point it was not open to them to have it corrected elsewhere, and if necessary in a court of law.

Mr. Gairdner himself gives evidence relating to these points which appears to me to be of considerable importance. He began the audit in July, 1894, of the balance-sheet of Calder & Co. for the previous April 30, which had never been completed, having then the knowledge of the terms of the agreement which he had acquired from the discovery of Mr. Blyth's abstract. He says, "Having become aware of the terms of the agreement, I examined the books differently on that occasion from what I had done formerly because the charge against profits might require to be differently treated. On examining the books at that time I found certain items which appeared to me not to be satisfactory." He also, in reply to the question, "Supposing you made an audit in that capacity of arbiter between parties, would you audit differently?" states, "I would analyse the allocation between capital and revenue somewhat differently."

The learned counsel for the respondent strenuously contended that the evidence given by Charles D. Gairdner ought not to be believed, and that your Lordships ought to hold it proved as matter of fact that Gairdner was, throughout the years for which he completed an audit, in the full knowledge of the terms of the minute of agreement. I do not think it necessary

to criticise their argument minutely. It mainly consisted in the suggestion that because Mr. Gairdner had frankly admitted his non-recollection of a variety of trivial circumstances which would not naturally have been retained by his or any ordinary memory he must be held to have spoken falsely when he affirmed that he had neither seen nor heard the tenor of the agreement until he discovered Mr. Blyth's abstract. I have carefully studied the evidence, and I cannot find the slightest ground for any imputation against the credibility of Mr. Gairdner. In the Court of Session, the Lord Ordinary (Low), before whom Mr. Gairdner was examined, accepted his testimony. His Lordship indicated an opinion that notwithstanding the audit Mr. Teacher would have been entitled to an accounting if it had been shewn that the ignorance of the auditor was due to the fault of the respondent, whom he acquits of all blame in the matter. He does not directly impute any fault or want of due care to Mr. Teacher, who equally with Mr. Calder acted in the honest belief that the auditor knew the terms of the agreement. But his Lordship seems to have thought that if the respondent was not to blame for the ignorance of their auditor, his procedure was binding upon Mr. Teacher. The Lord President (Lord Robertson) and Lord M'Laren, who were the majority of the First Division, assumed the veracity of Mr. Gairdner's evidence. The Lord President said, "It happened, however, that the books were audited in each year, not by Mr. Blyth, but by his partner Mr. Gairdner, and the pursuer's point is that Mr. Gairdner says (and I hold this to be proved) that he never saw the agreement nor Mr. Blyth's précis of it." Lord Adam, who differed from his colleagues, in the result vested his judgment upon the proved ignorance of Mr. Gairdner.

I should have much hesitation in differing from the opinion of these learned judges upon a pure question of fact; but an examination of the evidence, with all the light that was thrown upon it by the arguments of learned counsel, has satisfied me that the testimony of Mr. Gairdner is candid and truthful, and is corroborated by all the other evidence in the case.

In 1894, being the last year of the agreement between Mr.

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Teacher and Mr. Calder, disputes arose between them which it is unnecessary to detail, and the result was that the audit of the books of Calder & Co. as at April 30, 1894, has never been completed. An unsuccessful attempt was made to refer to a neutral accountant; and, one of the two arbiters appointed by agreement for the settlement of differences arising out of it having died, the other, Andrew Mackinnon, bank agent, eventually declined to accept the reference.

Mr. Teacher, who is now represented in this appeal by his testamentary trustees, in March, 1896, brought the present action against Mr. Calder. It concludes, first, for a full accounting as to the profits of the business of Calder & Co. for the year ending April 30, 1890, and the four following years, and for payment to the pursuer of the share of net profits to which he was entitled under the minute of agreement; and, second, for payment of the sum of 15,000*l.* sterling. In the last place, it concludes for reduction, if necessary, of the several audits made by Mr. Gairdner for the years 1890, 1891, 1892, and 1894, and of the relative certificates granted by the firm of which he was a partner under their firm names of M'Clelland, Mackinnon & Blyth, and M'Clelland, Mackinnon & Co.

The Lord Ordinary (Low) on May 28, 1897, pronounced an interlocutor, by which he "dismisses the action, and decerns; finds the pursuer liable in expenses." On a reclaiming note by Mr. Teacher their Lordships pronounced the interlocutor appealed from, by which they "Recall the said interlocutor, decern against the defender for payment to the pursuer of 250*l.* sterling of damages quoad ultra dismiss the action, find the defender entitled to two-thirds of the taxed amount of expenses." (1)

The argument for the pursuer in the Courts below, as it was at the bar of the House, appears to have been addressed to four different points. First of all, it was contended that the audits made by Mr. Gairdner were not in terms of the minute of agreement, and ought, if necessary, to be reduced and set aside and an account taken of the business profits of Calder &

(1) 25 R. 661.

Co. during the currency of the agreement. In the second place, it was maintained that, assuming the audits made by Mr. Calder to be conclusive, there were certain erroneous entries on the balance-sheets which he had passed which ought to be corrected and effect given to the correction, inasmuch as the errors had been occasioned by the fraud or fraudulent misrepresentation of the respondent Mr. Calder. The principal items said to have been thus falsified were—(1.) a bad debt of 3096*l.* 12*s.* 6*d.* due to the firm of Calder & Co. by Rucker & Co., their agents at Riga, which it was alleged had become irrecoverable and ought to have been written off before the minute of agreement became operative; (2.) certain entries in the "Depreciation of Plant Account"; (3.) certain entries in the "Plant Repairs Account"; (4.) entries in the "Stock Account"; and (5.) entries in the "Suspense Account." In the third place, the pursuer claimed substantial damages in respect of the respondent's breach of contract, by drawing his capital out of the firm of Calder & Co. and employing it elsewhere, without the consent of Mr. Teacher, to such an extent as to reduce his capital in the business below the amount stipulated in the agreement.

The first, and in my opinion the nicest, point to be decided in this appeal is involved in the question whether the audits made by Mr. Gairdner can be rightly regarded as having been made by him in due fulfilment of the duty committed to his firm of M'Clelland, Mackinnon & Blyth by the fifth article of the agreement of April 11, 1889. To my apprehension that is a question which depends upon the law of Scotland. I am quite aware that legislation, comparatively recent, has done much to assimilate the laws of reference or arbitration in the two countries, but it has not yet made them quite the same. The Lord Chancellor (Cranworth) in *Drew* v. *Leburn* (1) stated that, as the law of England stood before the Act 3 & 4 Will. 4, c. 42: "If parties submitted a matter for arbitration to a private tribunal to be decided by a selected person, either of them might at any time, without assigning any ground, revoke that submission." In Scotland, from the earliest times, a

(1) (1855) 2 Macq. 1, 3.

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concluded contract to submit the determination of any point to the opinion or judgment of a private person cannot, unless the person referred to die or refuse to act, be revoked, save by consent of all the parties submitting and ousts all interference by the ordinary courts of the country. The fifth article of the minute of agreement was a concluded contract binding both parties to accept as final the decision of the firm of M'Clelland, Mackinnon & Blyth, or of any one of its members, upon the yearly balances of the books of Calder & Co., and the ascertainment of the net profits of its business to be divided between them in terms of the agreement.

It was argued for the respondent that the contract embodied in the fifth article did not constitute a proper arbitration. I freely admit that it did not contemplate a formal arbitration to be followed by an award, but it was none the less a contract of submission or reference which committed to the referee the decision of any point which might arise in the course of his audit. In my opinion the contract was of the same nature as a proper arbitration, in this respect—that it came within the well-known rule : " Seeing it is from the consent of the parties submitting that the whole power of arbiters is derived, their award or decree, if it be not given in conformity to those powers is null, not being founded upon any proper authority " (Ersk. Instit. bk. iv. tit. 3, s. 32).

It was also maintained for the respondent that it was not the intention of Mr. Teacher and the respondent that the accountant, acting under the fifth article, should know the terms of their agreement or of the reference which they made to him. I do not doubt that parties may agree to accept as final the decision or opinion of a referee who knows nothing except the question put to him, and is not to be informed who they are and what are their respective interests, but it must in that case very clearly appear that they so agreed. To arrive at the conclusion that there was any such agreement in the present case would be contrary to all the evidence. I think it is beyond reasonable doubt that Mr. Teacher and the respondent both contemplated and intended that the audit provided by the fifth article should be made by an accountant

who was conversant with the terms of the minute of agreement, and also knew that as between them his audit was to be final and conclusive. It seems to me to be equally beyond doubt that throughout the period during which audits were made by Mr. Gairdner the parties to the minute of agreement understood and believed that Mr. Gairdner knew its terms.

I have no desire to disparage the conscientiousness of referees, whether professional or not, but when parties agree to be bound by their opinion or decision as final, and also agree that they shall be informed of its finality, I am of opinion that the referee who gives an opinion or decision without knowing that it was meant to be conclusive does not act in conformity with the power that was conferred upon him. The objection in this case to Mr. Gairdner's audit is deeper still, because he was ignorant of the terms of the minute of agreement and of the precise nature of the interest conferred by it upon Mr. Teacher. Mr. Gairdner himself states that after he came to know the details of the minute in the year 1894 he no longer regarded the audits which had been made by him as satisfactory, and that with that knowledge he would have audited the books of Calder & Co. somewhat differently. I see no reason to discredit that statement. The evidence in this case shews that there may be considerable difference of professional opinion upon matters of audit, and I cannot resist the conclusion that Mr. Gairdner would have audited differently had he known the terms of the agreement, and also that his determination was final. If that were so, I do not think he can be said to have made the audit contemplated by the agreement.

The Lord Ordinary indicated an opinion that if Mr. Gairdner's ignorance of the terms of the minute of agreement had been traceable to the fault or negligence of the respondent Mr. Calder, Mr. Teacher probably would have been entitled to decree for an accounting. That conclusion does not necessarily suggest that his Lordship thought the ignorance of Mr. Gairdner was in some sense due to the fault of Mr. Teacher, and for that proposition I can find no evidence whatever. Mr. Teacher did all that he could be reasonably expected to do for the purpose of informing the accountant firm and its partners, and

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the non-communication of the contents of the minute to Mr. Gairdner, the partner who made the audit, was entirely due to the ill-health and subsequent death of Mr. Mackinnon, and to Mr. Blyth, assuming that he had done all that was necessary in giving his abstract to Mr. Mackinnon. It appears to me that a mutual mistake as to Mr. Gairdner's knowledge of the agreement for which neither of the parties to it was responsible was as good a ground in Scottish law for disregarding his audit and allowing an accounting as if the mistake had been occasioned by the fault or negligence of one of them.

The two learned judges who formed the majority of the Division were of opinion that Mr. Gairdner's evidence was trustworthy, and they did not impute his ignorance of the agreement to the fault or negligence of either Mr. Teacher or the respondent. But they were of opinion that Mr. Gairdner knew so much that he was in substantially the same position as if he had known the full terms of the agreement, and that his audit was necessarily the same as if he had been in possession of that fuller knowledge. Their conclusion appears to me to labour under a double vice in this respect: that (1.) it discards the referee's own statement that he would have audited differently, and (2.) it makes a new agreement for the parties which they did not make, and probably never would have made, for themselves.

I do not consider it necessary to discuss at length any of the other questions which were argued at the bar. I agree with your Lordships in thinking that the appellants, the trustees, have failed to substantiate any of the charges of fraud or misrepresentation brought against the respondent; and that the respondent ought, accordingly, to be assoilzied from the conclusions of the summons in so far as rested upon these allegations. I also agree with those of your Lordships who are of opinion that there is no ground for increasing the amount of damages for which the respondent has been found liable in respect of his breach of contract.

LORD SHAND. My Lords, I am also of the opinion which has been expressed by my noble and learned friend on all the points which he has mentioned.

The House is about to affirm the decision of the Court of Session in reference to the charges of fraud which have been brought against the respondent and which the appellants, Mr. Teacher's trustees, have failed to make out, and also in regard to the amount of damages for which a decree has been given. I shall only detain your Lordships by saying a few words on the subject of the only point on which the House is differing from the judgment of the Court of Session.

My Lords, I think it is clear upon the facts as they appear in the proof that Mr. Gairdner was not aware of the terms of the minute of agreement under which he was acting practically as an arbiter, or as the auditor whose finding was to be final between the parties; and I think it is further clear that neither party was to blame for that circumstance. Mr. Teacher had done his best to make the terms of the agreement known; but unfortunately Mr. Blyth, to whom they were communicated, had not handed on the agreement, and in point of fact its terms did not come to the knowledge of Mr. Gairdner. In those circumstances for four or five years (I am not sure which) Mr. Gairdner made the audit believing that he was simply acting, as his firm had done for a considerable time before, in an ordinary audit of a business firm with a view simply to reporting to the partners how matters stood between them. He was not aware that he was acting in a matter on which his judgment on any point that occurred to him in the course of his investigation would be final, and that his certificates when granted would fix finally the sums which were due from the one party to the other, or the sums which were due to Mr. Teacher, the appellant. Under those circumstances I agree with my noble and learned friend in thinking that that accounting must now be opened up. It appears to me that the evidence, especially the evidence of Mr. Gairdner himself, shews that if he had known the position which he was truly to occupy under the minute of agreement his audit would have been different.

The Lord Ordinary, when he sent the case originally for proof, put in a short but clear light the difference between the two positions of an auditor acting as an arbiter, and an auditor

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merely reporting to the firm how their books stood. He says, at p. 30 of the printed case before me: "In my opinion the pursuer was entitled to have the books audited in knowledge of the agreement and of the purpose of the audit. There are many matters—such as the value of the stock, the amount to be written off for depreciation, the striking off of debts as bad and such like—which an accountant auditing the books merely for the satisfaction of the sole partner would not investigate closely if that partner was satisfied, but which he would investigate closely if he knew that the purpose of the audit was to fix finally the share of the profits to which a party who had lent large sums to the firm was to be entitled. If Mr. Gairdner was not informed of the purpose of the audits, and of the effect which was to be given to the balance of profits brought out, I do not think that the audit can be regarded as an audit within the meaning of the agreement." In that statement I entirely concur.

Again, I find it was put to Mr. Gairdner himself in the evidence he gave that he had not known the character of this audit and the finality that was to be given to his findings. He is asked, "Did you do in this case just what you generally do when employed by a trader to audit in his interest? (*A.*) Yes. (*Q.*) Supposing you made an audit in the capacity of arbiter between parties, would you audit differently? (*A.*) I would analyse the allocation between capital and revenue somewhat differently. (*Q.*) You mean in the case of a partnership limited to a few years? (*A.*) Yes, and acting as arbiter. (*Q.*) Why would you do that? (*A.*) A man trading on his own account might charge up a number of entries to revenue which should be debited to capital account if there were other interests." Then he is asked, "Then had you at any time in signing these docquets the impression that you were giving an arbiter's award? (*A.*) No."

My Lords, it is true, as has been observed by the learned judges of the First Division, that Mr. Gairdner was made aware that Mr. Teacher had some interest in the profits, and no doubt it is a consideration which has to some extent raised a difficulty in my mind as to whether or not I should agree in what is now

proposed, that the fact of his knowing of this interest in those profits shewed him at least that there was a counter-interest to be attended to. But I have come to the conclusion that it was necessary in order to the proper discharge of his functions that Mr. Gairdner should not only know that there was an interest, but should know specifically what that interest was, and should carefully look into the matter and see that that interest was properly guarded. He did not know what the interest was at all, and he tells us himself when he became aware of that interest that he is satisfied he would have audited the accounts somewhat differently had he known of it; and accordingly when he became aware of it he at once made the parties aware of his position.

My Lords, I have only further to say that I think the analogy which has been suggested between this case and the case of counsel whose opinion is asked, without his being told that it is to be final and binding between certain parties, is a misleading analogy, and can have no application to a case like this. If counsel has merely a question of law before him, he has only to deal with it as such, and whether it is to be binding upon one party or upon a dozen parties is of no consequence. His opinion and answer will be the same. But an accountant has a great deal more to do than to give an opinion upon matters of law or of accounting. He has, in a case like Mr. Gairdner's, in making his audit to gather many facts for himself by independent inquiry; he has to ascertain the details of the business, and he has to put the facts together and then to draw inferences from them. A person in these circumstances is in a totally different position from counsel when giving an opinion on a question of law on facts supplied to him.

I am of opinion with your Lordship that the judgment which is proposed, reversing the decision of the Court of Session on one point, ought to be pronounced by this House.

LORD DAVEY. My Lords, I confess it is with some regret that I feel obliged to concur in your Lordship's opinion that the case must be sent back to the Court of Session to take the accounts between these parties. I regret it, first, because I

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am not satisfied that any substantial wrong or injustice has been done to the pursuer by the mode in which the accounts have been audited by Mr. Gairdner; and, secondly, because I am of opinion that no blame whatever is to be attached to Mr. Calder for Mr. Gairdner's failure to take the accounts in accordance with the minute of agreement of April 11, 1889. He assumed, and had the right to assume, that Mr. Gairdner's firm were in possession of the full particulars of that agreement, and that Mr. Gairdner, on behalf and in the name of his firm, was auditing the accounts on the basis of the agreement, and so as to bind Mr. Teacher and himself.

But, my Lords, I cannot dissent from the position of Lord Adam that a party cannot be held to be bound by an audit under an agreement of which the auditor was ignorant, and in particular when he was ignorant that his audit was to be conclusive between the parties. No doubt the reference and submission to the accountants was not in strictness an arbitration to be followed by an award or decree-arbitral, but it partook of the character of an arbitration in this respect—that the decision of the accountants was intended to bind the rights of the parties, and when made would have the effect of depriving both parties of their recourse to the ordinary courts. I think it appears from the evidence that Mr. Gairdner never intended to give a decision having this effect, and for aught that appears he was under the impression that Mr. Teacher was at liberty to challenge his decision by suit in the Court of Session.

Of course, parties may expressly or by implication agree to be bound by the decision of a person who does not know that his opinion is to have that effect, as when parties agree to accept the opinion of counsel on a joint case submitted to him on behalf of both parties. But there is nothing of that kind in the case before your Lordships. On the contrary, both parties assumed, and had the right to assume, that Mr. Gairdner was properly instructed. It is no answer to say that the certificates are those of the firm, and the firm were in possession of the agreement through Mr. Blyth. It is a question of fact—were the certificates relied on by the respondent in fact made

in accordance with the agreement, or were they made alio intuitu?

One may feel some legitimate surprise that the partner of an experienced firm of accountants intrusted with the performance of an important item of the firm's business should not have been put in possession of the proper materials, and also that Mr. Gairdner himself, when he knew, as he did, at a very early stage, that Mr. Teacher was entitled to three-eighths of the profits and was interested in the audit, did not ask to be furnished with the agreement giving Mr. Teacher his rights, the contents of which might materially affect his audit. But I do not feel at liberty to question Mr. Gairdner's positive statement that he did not know of the agreement and that he would have audited differently if he had known of it.

The condescendence contains numerous and detailed charges of fraud against the respondent. The Lord Ordinary and the learned judges in the Inner House were of opinion that these charges had entirely failed. The charges were repeated at the bar of this House, but I believe all your Lordships agree on this point with the Courts below. On one point only, that relating to Rucker's debt, the Lord President, while negativing any fraudulent intention on the respondent's part, expressed an opinion adverse to him on the merits. As the accounts have to be taken, I will not express any opinion on this or any other point arising on the accounts. I will only say that in my opinion each question should be considered by the auditor on its merits, and unprejudiced by any judicial dictum.

There only remains the question of damages for the breach by the respondent of his agreement not to withdraw his capital. It is admitted, and indeed appears on the face of the accounts, that the respondent did withdraw large sums for the purposes of employing them in other businesses carried on by him. The learned Dean of Faculty claimed to follow these sums and sought to make the respondent account to the appellants for the profits derived by the use of them. The contention was a novelty unsupported by either authority or principle. The money withdrawn was not Mr. Teacher's in any sense, and he

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had no interest in it except to have it employed in the respondent's timber business. But his representatives are entitled to damages for the loss he sustained by the respondent's breach of the agreement so to employ it. There is evidence that money could at that time be profitably employed, say at 8 per cent. per annum, in the timber business. But there is no evidence of any business being lost by the respondent, or of his being unable to tender for any contract from want of capital, and there is some affirmative evidence to the contrary. It also appears that the capital withdrawn was to some extent at any rate replaced for the purpose of trading by money borrowed from the bank, and interest at 5 per cent. was allowed on the money withdrawn, and the like rate only paid on the money so borrowed. This was, of course, wrong on the respondent's part, as it exposed Mr. Teacher's loan to unnecessary risk, but his loan has now been paid in full, and the only element of damage is the loss of profit or income. On the whole, taking all the circumstances into consideration, I am unable to say that the appellants, Mr. Teacher's trustees, have made out to my satisfaction that Mr. Teacher suffered any larger damages by the respondent's breach of his agreement than the sum which has been awarded to them by the Court of Session.

I concur in the Order which has been proposed by my noble and learned friend on the woolsack.

Balfour, Q.C. With regard to the costs, your Lordships will no doubt bear in mind that not only nine-tenths of the record, but a very large part of the evidence, and the time occupied in this case was concerned with the charges of fraud that were made against the respondent—charges which all your Lordships, agreeing with the Court below, have found to be baseless.

LORD WATSON. Their Lordships have had that in view, and they propose to disallow the expenses to either party in the Court of Session, and to give to the appellants, Mr. Teacher's trustees, the costs of this appeal.

Ordered, That the interlocutor of the First Division, dated February 25, 1898, *be reversed*

except (1.) *in so far as it recalls the interlocutor of the Lord Ordinary, dated May* 28, 1897, *and* (2.) *in so far as it decerns against the defender for payment to the pursuer of* 250*l. sterling of damages: That it be found and declared that the audits made by Mr. Charles D. Gairdner for the year ending upon the* 30*th day of April in the years* 1890, 1891, 1892 *and* 1893, *and the relative certificates granted by his firm, were not made or granted in accordance with the terms of the minute of agreement dated April* 11, 1889; *that subject to that finding and declaration the cause be remitted to the Court of Session with directions*—(1.) *To take an account, in terms of the said minute of agreement, of the net profits of the firm of Calder & Co., for the year ending April* 30, 1890, *and for the four following years;* (2.) *To assoilzie the respondent (defender) from the whole conclusions of the summons, in so far as the same are founded upon the alleged fraud, or fraudulent misrepresentation of the respondent: That it be declared that neither of the parties be entitled to decree for the expenses of process incurred in the Court of Session, and that the respondent do pay to the appellants, Mr. Teacher's trustees, their costs of this appeal.*

Lords' Journals, July 24, 1899.

Agents for appellants: *A. & W. Beveridge, for Carmichael & Miller, W.S., Edinburgh, and Anderson & Mackinnon, Writers, Glasgow.*

Agents for respondent: *Hollams, Sons, Coward & Hawksley, for Alex. Morison, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1899 July 27.

RODERICK SCOTT AND OTHERS . . . APPELLANTS;

AND

LORD PROVOST, MAGISTRATES AND TOWN COUNCIL OF GLASGOW . } RESPONDENTS.

Market—By-laws—Ultra Vires—Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 42—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *s.* 32, *sub-s.* 2.

The Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32, sub-s. 2, incorporated with the said Act the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), and s. 42 of the latter Act provides that the undertakers (authorized by the special Act to regulate a market or fair) may, from time to time, make such by-laws as they think fit (inter alia) "For regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein; and for preventing nuisances or obstructions therein, or in the immediate approaches thereto."

A local authority purporting to act in the exercise of the powers of the above Acts made a by-law to the effect that sale-rings at a public market belonging to it should not "be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying":—

Held, affirming the decision of the First Division of the Court of Session (Lord Shand dissenting), that the by-law was not ultra vires.

APPEAL from a judgment of the First Division of the Court of Session, Scotland. (1)

The question in this appeal was whether a certain by-law made by the Lord Provost and magistrates of Glasgow, the respondents, and the local authority, acting under the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57) (2), which, excepting

(1) (1899) 1 F. 665.

(2) Sect. 32 of the Diseases (Animals) Act, 1894, provides:—"(1.) A local authority may provide erect and fit up wharves, stations, lairs, sheds, and other places for the landing, reception, keeping, sale, slaughter, or disposal of foreign or other animals, carcases, fodder, litter, dung, and other things.

"(2.) There shall be incorporated with this Act the Markets and Fairs Clauses Act, 1847, except ss. 6 to 9, and 51 to 60 thereof.

"(3.) A wharf or other place provided by a local authority under this section shall be a market within that Act, and this Act shall be the special Act. . . . ."

ss. 6 to 9 and 51 to 60, incorporated the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14) (1), was ultra vires of the respondents as such local authority. The appellants Roderick Scott and others, the pursuers in the Court of Session, were members of the fleshers' trade in Glasgow, and included among their number cattle salesmen and live-stock agents, dead-meat salesmen and wholesale and retail fleshers. The by-law on which the appeal depended was as follows: "The sale-rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale-rings shall not be used for private sales or for sales to any limited number of persons or for sales in which any class of the public are excluded from bidding or buying." The by-law was intended to regulate the

(1) Sect. 42 of the Markets and Fairs Clauses Act, 1847, provides that—

"The undertakers may from time to time make such by-laws as they think fit for all or any of the following purposes; (that is to say,)

"For regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto:

"For fixing the days, and the hours during each day, on which the market or fair shall be held:

"For inspection of the slaughter-houses, and for keeping the same in a cleanly and proper state, and for removing filth and refuse at least once in every twenty-four hours, and for requiring that they be provided with a sufficient supply of water, and preventing the exercise of cruelty therein:

"For regulating the carriers resorting to the market or fair, and fixing the rates for carrying articles carried therefrom within the limits of the special Act:

"For regulating the use of the weighing machines provided by the undertakers, and for preventing the use of false or defective weights, scales, or measures:

"For preventing the sale or exposure for sale of unwholesome provisions in the market or fair:

"And the undertakers may from time to time, as they shall think fit, repeal or alter any such by-laws; provided always, that such by-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act, or of any Act incorporated therewith; and such by-laws shall be reduced to writing under the common seal of the undertakers if they be a body corporate, or the hands and seals of two of the undertakers if they be not a body corporate, and, if affecting other persons than the officers and servants of the undertakers, shall be printed and published as herein provided."

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business done in the auction sale-rings at the foreign animals wharf at Pointhouse, Glasgow. This wharf was established and maintained by the respondents as local authority under the Diseases of Animals Acts. It was the only place in Scotland at which, under the orders of the Board of Agriculture, foreign cattle could be imported and sold alive. The sale-rings in question were established by the respondents on a certain portion of the said wharf for the purpose of facilitating sales by auction; and by a by-law made in 1896 the respondents enacted that no auction sales should be held except in the rings established for the purpose. Owing to the unique position of the said wharf that portion of the appellants' business which consisted in dealings in foreign live meat could be carried on by them only at the said wharf so far as auction sale was concerned. In August, 1898, additional by-laws were made, and the by-law now in question was one of these. The by-law compels the appellants to throw open their foreign live-meat sales to all comers, whether members of the trade or not. But the appellants alleged that it was universally customary and necessary for the conduct of their business that the wholesale market should be restricted to members of the trade; and that they had hitherto so restricted it, and in the conditions of sale published at their auctions they had been in use to advertise this restriction; that the by-law was seriously prejudicial to the appellants as members of the trade, and interfered with their own conditions of contract. They further alleged that the wharf at Pointhouse was open to all importers, and can be freely used by others who preferred to sell to all comers. The First Division of the Court of Session held (Lord Kinnear dissenting) that the by-law was valid. (1)

May 5, 9. *Balfour, Q.C.*, and *Shaw, Q.C.* (both of the Scottish bar), for the appellants. The appellants contend that the respondents had no power to dictate the mode of carrying on sales. The respondents may fix the time of holding the market and the space to be set apart for it and suchlike, but have no power to enact that the appellants shall be bound to

(1) 1 F. 665.

sell to every one who wishes to purchase. The appellants' mode of sale does not prevent other persons from selling in whatever mode they think proper. The appellants are a particular class of dealers who in the conduct of their business only sell wholesale, and do not hold themselves out as selling to the public. They have a right to sell in the market, and, having that right, they can say that they do not profess to sell to everybody. In *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (1) it was held that to sell in the appellants' mode was not an actionable wrong; and, therefore, if the appellants were not restrained by the by-law in question they could legally sell to a restricted class. The appellants claim no monopoly—others can sell as they please. A public auction can be legally restricted to certain buyers only. It is not denied that there is plenty of room in the market for every description of seller, and, therefore, every lawful mode of selling ought to be allowed. Neither the scheme nor the scope of the Markets and Fairs Clauses Act, 1847, was intended to vary the customs of sale, and the statute gives no power to regulate the mode of sale. The proviso of s. 42 that the by-laws shall not be repugnant to the law shews that where a by-law attempts to stop a legalised mode of sale the by-law is repugnant to the law: *Dearden* v. *Townsend* (2); *Municipal Corporation of Toronto* v. *Virgo*. (3) There was no doubt that if both the co-operative buyers and the wholesale buyers attended the appellants' sales better prices would be obtained; but the appellants cannot get both to come, and they must choose between them, and they chose the best course for their trade. Further, the by-law in question is not a by-law regulating the use of the market, but one regulating the contracts certain sellers may make. There always has been a sale to a restricted class alone, and the appellants have a right to secure reasonable facilities to conduct their sales as hitherto—that is, in their special mode of dealing.

Haldane, Q.C. (with him *J. J. Cook*, of the Scottish Bar), for the respondents. The by-law is a regulation, not of the

(1) (1898) 35 S. L. R. 645. (2) (1865) L. R. 1 Q. B. 10.
(3) [1896] A. C. 88.

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mode of sale, but one dealing with how this public market shall be used. For the law of markets, see *In the Matter of the Islington Market Bill* (1) and *Magistrates of Edinburgh* v. *Blackie*. (2) If the co-operative buyers were not allowed to use every part of the market, they would have a right of action against the grantees of the market. The respondents found the market used for exclusive dealing. They considered that was not right according to their obligations, and they determined not to allow boycotting.

Balfour, Q.C., in reply.

July 27. EARL OF HALSBURY L.C. My Lords, I am of opinion that this appeal should be dismissed.

The respondents (the Lord Provost, Magistrates, and Town Council of Glasgow) have, with the sanction of the Board of Agriculture—without which the by-law in dispute would have had no validity—framed a by-law which purports to be a by-law for the regulation of the use of a certain market in which foreign cattle are sold. The by-law is in these terms: [His Lordship read the by-law given above.]

It is argued against this by-law that it is ultra vires, and undoubtedly if that can be made out the approval of the Board of Agriculture could not make it valid. But it is a little difficult to see why a by-law made for the regulation of the market of which the respondents are the local authority is either in its terms or in respect of its substance outside the jurisdiction of the local authority which is invested with the power and the duty of regulating the public market in question.

It seems to me that the by-law, however expressed, means that a place intended for the public sale of cattle by auction shall be sanctioned, and that the public and every member of it shall be permitted to go to that place, and upon equal terms with his neighbour be permitted to buy and to have his bid treated on equal terms, so far as validity is concerned, with that of everyone else.

The opposite contention appears to be that it ought to be competent to the appellants to exclude any but a selected body

(1) (1835) 3 Cl. & F. 513, 518. (2) (1886) 11 App. Cas. 665.

of purchasers from attending the auction and bidding at a sale by auction which is nevertheless to be treated as a public one. I do not know whether they would go so far as to contend that the public ought not to be permitted to enter; but in substance, it would to my mind make no difference if their contention did go so far as that; because if they cannot be permitted to enter as purchasers it becomes a very idle distinction to inquire whether their physical presence is actually excluded when their right to enter as purchasers is taken away.

My Lords, I think it is important to notice that no one suggests any right in any one to restrict their perfect freedom to sell to whom they please, but what has been done is to regulate the use of a part of a public market dedicated to public sales by auction and prevent its being made a place for private sale to a restricted class of customers.

I am wholly unable to understand how it can be suggested that such a by-law controls other sellers or buyers as to the conditions upon which they shall sell or buy. What the by-law does is to prevent a particular class of buyers and sellers from appropriating to themselves accommodations intended for the public. I have a difficulty in even following the argument that the by-law in question purports to place any restriction upon any form of trade or free trade. There is hardly any market in which the regulating authority does not make, and properly make, some restrictions as to what particular form of trade shall be carried on at particular parts of the market, and it is impossible, as it appears to me, to say that such regulations are not within both the words and the spirit of the statute which authorizes the local authority to make such by-laws as they think fit for regulating the use of the market-place and fair and buildings, &c., therein. Such by-laws certainly seem to regulate the use of the market; and in order to shew that they are invalid, it seems to me to be necessary to establish that they were repugnant to the laws of that part of the United Kingdom where they were to have effect. I cannot follow the reasoning that in dealing with the public sale by public auction there is anything contrary to the laws of Scotland in providing that at a public auction all mankind may bid, and that no

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auction shall be held in this particular place unless it is so held that all mankind may bid.

I am by no means certain that the language of the by-law is not unnecessarily diffuse, and if it had described the sale-rings as the place at which cattle should be sold by public auction, it would not have been quite enough to render unlawful the use of the sale-rings for any sales, but those by public auction, and such a sale as the appellants insist on holding would not, in my view, be a public auction at all.

I notice that one learned Lord (Lord Kinnear) uses the phrase that the form of the by-law is one which appeared to him to be "in design and purpose a regulation of the conditions of contract and not of the use of the market." But, with the greatest submission to that learned Lord, such a description of the by-law seems to leave out of sight that it is not the conditions of contract generally, but such conditions as shall restrict the use of a part of the market dedicated for public sales to a particular class of buyers and sellers.

Nor am I able to agree with the same learned judge, who points out that it is one thing to say that you may regulate the use of the market-place so as to provide accommodation for buyers and sellers, although your regulations may confine the persons who make a particular kind of contract to one part of the market, and exclude these from others (which the learned judge appears to admit would be perfectly lawful), but he adds: "It is a totally different thing to say that, irrespective of all conditions of accommodation or convenient use, you may forbid those who make use of the market to make contracts of which, on economical grounds, you do not approve, and to choose their own customers."

I agree entirely with the learned judge in saying that what he puts as an equivalent of what is done here would be ultra vires of those who attempted to enact such a by-law; but my answer would be that the present by-law does nothing of the sort. What it does say is, you shall not use this particular place as a public auction unless it is a public auction, and you shall not use it so as to exclude the public from bidding here as at a public auction.

The truth is, if one analyses what is the real grievance, it appears to consist in this—that the local authority have not provided peculiar accommodation for the classes who wish to deal in this restrictive way. Whether they are under any obligation to do so I am not prepared to say, although I do not see anything in the statute which creates such an obligation; but whether they are under such an obligation or no is not the question that arises upon this appeal.

My Lords, I am of opinion that the local authority have acted strictly within their jurisdiction in regulating this particular place in this market, and I think that it matters little whether in the language they have used—and I am disposed to think unnecessarily used—they have seemed to prescribe the terms of a contract. I think in substance what they have simply done is to make this particular place a place for public auctions with all the incidents which, according to ordinary practice, are attached to a public auction, and to prohibit its use for any other purpose.

I am, therefore, of opinion that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON (read by Lord Davey). My Lords, the respondents, as the local authority under the Cattle Diseases Acts, 1894 and 1896, have established a foreign animals wharf at Pointhouse, Glasgow, where all cattle brought to Scotland from the United States of America and from Canada are landed, and where such cattle must be slaughtered within ten days after their arrival. The wharf is a public market, and is the only place in Scotland at which American and Canadian cattle are permitted by the order of the Board of Agriculture to be landed and sold.

By s. 32, sub-s. 2, of the Contagious Diseases (Animals) Act, 1894, there are incorporated with it the Markets and Fairs Clauses Act, 1847, with the exception of ss. 6 to 9 and 51 to 60 thereof. By the 42nd section of the Act of 1847 the undertakers, who are in this case the respondents, are (inter alia) empowered to make by-laws "for regulating the use of the market-place and fair and the buildings, stalls, pens, and

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standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto." They are also authorized, from time to time as they shall think fit, to repeal or alter any such by-laws, "provided always, that such by-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act."

The respondents provided at Pointhouse Wharf certain inclosures or sale-rings in which foreign cattle might be exposed and sold by auction, and in August, 1896, by-laws for the regulation of these rings were prepared by the respondents, and were duly approved by the Board of Agriculture. In August, 1898, additional by-laws for the management, regulation, and use of these sale-rings were made by the respondents, and were approved and confirmed by the Board of Agriculture. By the first article of these additional by-laws it was enacted that—"The sale-rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale-rings shall not be used for private sales or for sales to any limited number of persons or for sales in which any class of the public are excluded from bidding or buying." The rest of the additional by-laws relate to penalties for contravention of or failure to observe the foregoing enactments, and to the date at which the by-laws were to come into operation.

The appellants, who were the pursuers of the action, are all members of the fleshers' trade, generally in Glasgow and its suburbs; and when buyers of foreign cattle they purchase for retail disposal. They allege, and it does not seem to be disputed, that they act as importers, auctioneers, and buyers, as the case may be, of American and Canadian cattle. There has been considerable friction between the appellants and members of the same trade with them and purchasers on behalf of co-operative societies, who make a practice of buying imported cattle at the Pointhouse sales in order to supply co-operative consumers buying retail at their stores at wholesale prices. The appellants and other persons in the same position have undoubtedly the right, according to the law of Scotland, so

long as they sell at their own mart or in their own premises, to select the customers to whom they will sell; and although such a sale would not in the strict sense of the law be a sale by public auction, they have a right, as one of the conditions of their selling, to prescribe the persons or class of persons from whom they are willing to accept a bid.

The sole conclusion of the appellants' action is for reduction of the additional by-laws of 1898 on the ground that (1.) these by-laws were illegal and unauthorized by statute; and (2.) that they were not duly approved by the Board of Agriculture in terms of the statute. The second ground of reduction is not now insisted on. The Lord Ordinary (Kincairney) repelled both reasons of reduction, and assoilzied the respondents with expenses. On a reclaiming note to the First Division of the Court, the Lord President (Lord Robertson), with Lords Adam and M'Laren (dissentiente Lord Kinnear), adhered to the interlocutor of the Lord Ordinary with additional expenses. (1)

In my opinion by-laws made for the Pointhouse Wharf in virtue of the power conferred by the Markets and Fairs Act, 1847, must, in order to their validity, in the first place relate to the wharf itself or to the conduct of the persons who use it, and, in the second place, must not be repugnant to the law of that part of the United Kingdom in which the wharf is situated. If a by-law offends in either of these particulars it is ultra vires of the respondents as undertakers of the wharf, and cannot derive any validity from the approval of the Board of Agriculture. Now it does not appear to me to admit of reasonable doubt that the by-laws sought to be reduced relate to the use of those portions of the wharf which are designated "sale-rings"; and that the provisions which they contain in regard to the sale of cattle in these rings by what is known to the law as public auction are in accordance with the law of Scotland. The appellants, however, contend that the by-laws are, in the sense of s. 42 of the Markets and Fairs Act, 1847, repugnant to the law of sale which prevails in Scotland, in so far as they provide that it shall be open to any member of the public present to bid for the cattle, and that it shall not be

(1) 1 F. 665.

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competent for the seller to use the sale-ring "for sales in which any class of the public are excluded from bidding or buying."

The gravamen of the appellants' complaint, when closely examined, resolves itself into the objection, not that the additional by-laws per se are necessarily repugnant to the public law, but that they are repugnant so long as no provision is made at the wharf for enabling the seller to dispose of his foreign cattle to any class of purchasers whom he may select, who alone shall be entitled to bid, he undertaking to sell to the member of that class who makes the highest offer. If suitable accommodation were provided, in which the exposers of foreign cattle were permitted by the by-laws to sell to the highest bidder of a circle of customers not representing the public, but selected by the exposers themselves, the objection of the appellants would disappear.

Accordingly, the real question at issue between the parties appears to me to come to this: Do the Cattle Diseases Acts of 1894 and 1896, or the Markets and Fairs Act, 1847, either directly or by implication, impose upon the respondents the duty of providing accommodation at the landing wharf in which each importer of American or Canadian cattle can sell, not by public auction, but by auction upon the same terms and conditions, in so far as regards the persons or class of persons entitled to purchase, which he could lawfully impose in the case of a sale upon his own premises? In the Cattle Diseases Acts there is not a word to suggest that any such duty is incumbent upon the undertakers; and I am of opinion that the provisions of the Act of 1847, to the effect that the by-laws or regulations of the market must not be repugnant to public law, cannot be reasonably construed as imposing upon the undertakers the duty of establishing sale-rings for cattle in which each individual importer can sell by auction to a class of customers or bidders selected by him.

On these grounds I am of opinion that the judgment appealed from ought to be affirmed.

LORD SHAND. My Lords, this case raises, as I think, an important general question—the question, namely, whether the

administrators of a public market, under the statutory authority given to them to make regulations or by-laws for regulating the use of the market, are entitled to impose conditions which shall have the effect of preventing sellers of goods from limiting the class of purchasers with whom they mean to deal, as they undoubtedly can do in premises of their own.

In the First Division of the Court of Session Lord Kinnear was alone in holding that the magistrates of Glasgow, as the administrators of the market, had no power to make the regulation complained of, having the effect above stated—the learned Lord Ordinary and the three other judges of the Division holding a different view. I regret to say I fear I shall occupy a similar position in this House, for, with every desire to make the judgment to be now pronounced unanimous, I remain of the opinion which I formed in the course of the discussion—that the decision ought to be reversed—and this after the renewed and careful consideration I have given to the case from my knowledge of your Lordships' views to a contrary effect.

The origin and history of the question raised is interesting, and has, in my opinion, a material bearing on the judgment to be now given. In 1879 the magistrates of Glasgow, on the requisition of the Privy Council, acting under the Diseases (Animals) Acts then in force, opened a pier and market for the reception, slaughter, and sale of foreign cattle and sheep at Pointhouse Wharf in Glasgow, and from that time onwards a very large trade in the importation of cattle from the United States and Canada has taken place. The market served for the whole of Scotland, and was provided, as the respondents state, like every other public market, "for the benefit of the whole community." The business is subject to all the restrictions imposed for the prevention of disease under the Diseases (Animals) Acts, and the Glasgow magistrates are the local authority under whose administration it is carried on. They have the right to make the charges authorized as dues at the rates authorized by the Board of Agriculture from the public, who, on the other hand, have the right to the accommodation they require for their trade or business. The cattle, as the

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statute requires, must be slaughtered within a limited time, and may either be thereafter removed for use by their owners, or may be sold by them when alive or dead privately or by auction.

In the use of the market in which sale-rings are provided for auction sales, a number of butchers, the owners of imported cattle, were for some years in use to sell their cattle privately or by auction as they thought fit; and considering it to be for their interest to sell only to persons of their own trade, they imposed the condition in regard to their sales by auction that these sales should thus be limited as regards the class of purchasers who might compete. Their object was to exclude co-operative societies, purchases by whom without the intervention of retail butchers or middlemen were, in their opinion, injurious to the trade profits of their business generally. The Scottish Co-operative Wholesale Society, in the interest of themselves and other similar societies, raised an action in the Court of Session, seeking to have it declared that these sales in which the sellers limited the class of purchasers were not lawful. In that action the Lord Ordinary (Lord Kincairney), in an able and exhaustive judgment (35 S. L. R. p. 645), held that the sellers in the use of the public market for the sale of their cattle were entitled to impose the condition they did. The law he so laid down was merely the affirmation of the elementary principle that any owner of property is entitled to fix the manner and terms and conditions on which he will agree to part with it; and of the soundness of a decision affirming that principle there can, I think, be no doubt. The further contention of the societies that the proceedings of the butchers amounted to an illegal conspiracy was rejected on the ground that they were pursuing a legitimate trade object, and the decision was acquiesced in.

The co-operative societies seem, however, to have thought that their object might be gained in another way, and to have applied to the magistrates and council as local authority to pass a regulation which would have the effect they desired. Accordingly they procured the following by-law to be made, or at least this by-law was passed by the magistrates as local authority: [His Lordship read the by-law.]

This by-law was passed, not because of any want of the fullest accommodation in the market for the requirements of all sellers, nor in any way because of any additional risk of the spread of cattle disease, but entirely on the views the council, or it may be a majority of the council, entertained on a question of general policy or economics. The by-law received the approval of the Board of Agriculture. Without such approval it would have been of no avail under the statute of 1894; but that approval cannot validate the by-law if it was ultra vires of the council. In my opinion it should not have been approved of, because it went beyond the powers of the town council under the statutes as administrators of the market, and because it was sanctioning an unwarranted and, as many persons will think, a mischievous interference with the liberty of persons in the disposal in a public market of their own property.

The only point now raised under the appeal is whether the by-law just quoted, passed by the respondents as the local authority in the administration of the public market, is effectual as being within their powers. The answer to this question depends primarily on the terms of the general statute, the Markets and Fairs Clauses Act, 1847, which however, in so far as incorporated, must be read and construed as one Act with the Diseases (Animals) Act of 1894, of which for the present question it forms part, and the provisions of which have an important bearing on the purposes for which the power to make by-laws has been committed to the local authority. The object of passing a general Markets and Fairs Clauses Act was to enable the Legislature in legislation after 1847 in regard to markets to incorporate such of its provisions as might suit particular cases, and any decision to be now pronounced determining the limits and scope of the local authority to make by-laws, though no doubt applying in the first instance only to the circumstances of this case, must be of authority in many other questions with reference to other public markets administered by local authorities having the powers conferred by the Act of 1847.

In coming to the question what are the powers which the Legislature has thought fit to delegate to the local authorities—

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that is, to the magistrates and town council in burghs, and to the county council in counties—before looking, as one must do, with much care at the language of the general Act, it seems to me that, in providing for an authority which is to have the administration of the markets for the use of the public, sellers and buyers, it is difficult to suppose there should be given the extraordinary and unprecedented power of interfering with the conditions of sale which the seller may desire to impose in the sale of his goods. One would naturally expect that the administrators of a public market, maintained by a public rate and from the dues which persons requiring accommodation must pay, should acquire no right to control the exercise of the ordinary rights which sellers have in the sale of their goods and merchandise, whether by private sales or by sales more or less of a public nature. Accordingly, unless the language of the statute in clear terms gives the power to restrain that right, the statute cannot have that effect. Again, no one would, I suppose, maintain that the powers delegated to the local authority are unlimited, and that the Legislature has given to administrators the full powers which Parliament itself possesses, which might conceivably go so far as to prescribe the conditions which must enter into contracts of sale, or offers to sell goods in the market. There is no indication of what is to be taken as the limit of the powers of the local authority (such as no doubt your Lordships' judgment should now supply) in any of the judgments appealed from, with the exception of that of Lord Kinnear, with whose views, as I have said, I concur.

In the provisions of the Diseases (Animals) Act, 1894, provision is made for the sale or disposal of imported foreign animals and of their carcases, and for the creation of an administrative body for the management of the market, by s. 32 of the statute, which provides as follows: [His Lordship read the section.]

In order to form a sound judgment as to the scope and effect of the provision by which the delegated powers are committed to the local authority, it is in my opinion essential to give particular attention in detail to the language of the clause by which these powers are given. That power of enacting by-

laws is conferred by s. 42 of the Markets and Fairs Clauses Act, 1847, in the following terms: [His Lordship read the whole section.]

In my judgment this section gives what I would call the ordinary powers of administration of the market in question, of which the traders are entitled to have the use, on the footing that the administrators shall afford the facilities which the accommodation admits of to sellers and buyers for the sale and disposal of cattle. With great deference to your Lordships' opinion to a contrary effect, I am unable to find anything in the language of the statute giving the extraordinary power of controlling sellers or buyers as to the conditions on which they shall sell or buy, whether in making private sales or sales of a more or less public nature, whether in making sales to individual purchasers or amongst a limited class of purchasers, or thrown open to all. But I am further and separately of opinion that, even if the language used admitted of the construction that the administrators can prescribe the conditions on which alone sales shall take place, the condition they have imposed in this case is ineffectual because it is repugnant to the law.

The opening part of s. 42 gives power to make by-laws "for regulating the use of the market-place and fair," and under these words alone, taken by themselves, the learned judges have held that the power claimed has been given. The term used is not markets, but "market-place," which means only the locality or ground on which the market is held. Any one who enters the market and there makes a purchase or sale is, no doubt, in a popular sense, making a "use" of the "market-place," and the ground of the judgment now the subject of appeal would apparently authorize any regulations whatever which the local authority may think fit to make dealing with the conditions of contracts there made. The test, and the only test which, for example, the learned Lord President gives, is that of ascertaining whether the contract is made within the physical boundaries of the market-place. If so, the local authority is, in the judgment of his Lordship, all-powerful, subject only to this, that the by-law shall not be repugnant to the general law. I cannot think this is a sound view. The

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language of the provision of s. 42 is, in my opinion, intended and calculated to cover those matters of detail and of detailed organization to which every market authority must attend in order to make and keep the market-place suitable and proper and convenient as a place for the purpose for which it exists, and nothing more. The vital matter to which the local authority in their regulations (which, though called by the higher-sounding term of "by-laws," are regulations only) must, in this instance, give attention is, of course, the prevention of cattle disease arising or spreading. Again, provisions must be made in this, as in the case of all markets existing for public use, for securing cleanliness throughout the whole premises, including accesses, and for preserving order, and for the like subjects which occur to one as necessary in the administration of any market. The full meaning of the language of the statute is entirely satisfied by reference to these matters, and, if it was the purpose of the Legislature to give the extraordinary power claimed, this would have been done in express terms, and not by such terms as are quite suited, and indeed necessary, for the objects I have stated.

The words in the statute "for regulating the use of the market-place and fair" are followed by these words: "and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto," all of these terms relating only to the arrangements required for carrying on the traffic as regards convenience, good order, and cleanliness. The same observation applies with even greater force to the whole of the other details with which the local authority is by the rest of s. 42 to deal by its by-laws, namely, the fixing of days and hours on which the market is to be held, inspection of the slaughter-houses, the removing filth, the providing of a proper supply of water, the prevention of cruelty to the animals, the preservation of order amongst the carriers and fixing their charges, and regulating the "use" of the weighing-machines, and providing of proper weights and measures. The only clause which touches or refers to sales, or the sale of goods or articles, is in these terms: "for preventing the sale, or exposure for sale, of un-

wholesome provisions." It seems to me that here, if anywhere, had it been intended that the local authority should have the extraordinary power to impose conditions relating to the stipulations of the contracts which sellers and buyers might make with each other, that authority would have been given.

The peculiarity of this particular market consists in this, but in this only, that to prevent the introduction or spread of cattle disease the cattle must be killed and removed within a very limited time, and everything conducted under careful and stringent regulations with that object. As to the sale of cattle, the market, subject to regulations for the prevention of disease, is in the same position as all other public markets. It follows that, if the by-law now in question is held to be within the powers of the local authority, it will be in the power of such authorities generally to make similar by-laws applicable to any market in which sales take place, and consequently to make by-laws which shall limit or prescribe the conditions on which buyers and sellers may deal with each other, although they are exercising a public right in a public place.

The by-law in question is confined to the power of sale by auction. If the provision or a similar provision were made by a by-law which should apply to private sales also, and sellers were required to sell to all proposed purchasers on the same terms and with the same advantages, so that the butcher could not limit his sales to the trade only, though he desired to do so, the ground of judgment in the Court below involves the conclusion that such a by-law must be effectual, for the sole ground of judgment is that the transaction takes place "in the use of the market-place," and the local authority is entitled to pass by-laws "regulating the use of the market-place." The same reasoning would apply to a regulation restricting the conditions of sale in another way, and declaring that sales must be confined to purchasers living within a certain district or area only favoured by the local authority. Such a construction of the words of the Act goes greatly beyond administration as given to public bodies holding a public market for the public behoof, and I cannot find anything in the language used in the statute to warrant this.

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Applying the observations I have made (and made at greater length than I desired, because of my difference of opinion from your Lordships), I must now observe that it is essential to bear in mind that the question whether the by-law complained of is within the powers of the local authority is to be answered in these circumstances—that it is not suggested (1.) that sales under the prohibited condition have any relation to precautions required for the prevention of disease; or (2.) that there is any want of accommodation in the market-place, furnished, as it is, with sale-rings for sales by auction, just as it is provided with sheds or yards for sales by private bargain. If any reasons in support of the by-law on either of these grounds had existed, they would have been stated, and might have been fatal to the appellants' contention. Thus, had it been the fact that the market-place was so limited in extent that there was space only for one class of sales by auction, and that the local authority had been compelled to select between auctions amongst a limited class and auctions open to all buyers, and had chosen the latter, and had in consequence issued this by-law, the appellants would probably have no answer to a plea which would be founded on the necessity of the case. Any regulation founded either on risk of spreading disease or deficient accommodation would fall under administrative powers as to the use of the market-place, as such powers are and must be generally understood. There is, however, no room for the suggestion that, by arrangement of days and hours of sale, the sale-rings cannot be put at the disposal of the appellants when they desire it. Accordingly, all that can be said for the by-law is not that it is required on account of any risk of disease, or because there is any want of suitable accommodation, but only this: "We, the town council, think, as a matter of public or general policy, that it is for the advantage of the public that sales by auction should be open to all bidders, and therefore we forbid such sales on any other terms." I say nothing of the policy of such a regulation excepting this—that if it be sound it should be by public law made applicable to all sales by auction, even those made by persons on their own premises, or on premises taken by them for the purpose of such sales,

and that till such regulation is proposed and carried (if it could be carried) sellers in a market-place, which they have a right to use, have right also as members of the public to sell their goods subject to the conditions they think fit as to the prices they will accept, and just as much as to the class of competitors they will admit. I put the case that a dealer having received a consignment of more or less cattle has been in treaty to sell the lot with five or six different dealers. Why should he not be able in a public market to offer these cattle by auction amongst these five or six persons exclusively? And I can find no good reason in answer to this question. I fear the true reason of the decision of the learned judges in the Court below, as it was the reason of the local authority in passing the by-law, is the disapproval of dealing which excludes one or more class of purchasers; but the liberty of an owner of property to deal with his own without restriction is of far more importance than an attempted check to a kind of dealing of which a local authority may not think fit to approve.

It appears to me, with great deference to your Lordships, that it is entirely fallacious to represent the regulation in question as one relating only to a part of the market. In form it may be so. In substance it is not so. The sale-rings are the only part of the market in which cattle can be sold by auction. If there were another part of the market set aside for sales by auction in which the sellers could limit the class of purchasers as they desire, I could see and appreciate your Lordships' views. There might in that case be a sufficient answer to the appellants' case. But it is not so. In substance and effect the regulation is a prohibition against any sales in the market by auction except by auction where every one may compete, and that in my opinion is not a proper market regulation of an administrative nature, but a direct and unlawful interference with sellers as to the conditions which they are entitled to impose in the sale of their own cattle or goods. A sale by auction is no doubt usually by public auction open to all; but an owner of goods or cattle in selling either privately or by auction has an absolute right to offer to sell his property,

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and to sell only to such persons or such classes of persons as he thinks fit.

On these grounds I am of opinion that the local authority, as administrators only of the market, have no power to limit the conditions under which sellers may dispose of their cattle. But even if the statute can be read as going beyond administration, and giving power to interfere with the conditions of contracts, that power is limited by the provision that the by-laws shall not be repugnant to the general law of the country. What is the meaning of this restriction? The market is a public market, and in such a market those who use it and have a right to use it on payment of the dues have the right, according to the common law affecting public markets, to fix the conditions on which they shall sell their goods as to price, for example, and as to the persons to whom they shall sell. This seems to me to be an incident of the common law, and that it is repugnant to the law that the local authority should by regulation interfere with or abridge this right. Thus, if the local authority should attempt by regulation to fix a maximum price which a seller must charge for his stock, alive or dead, I think this would be repugnant to the law, and I say the same as to restriction of the persons to whom sales shall be made privately, or by auction, or to impose similar conditions. In the case of the *Corporation of Toronto* v. *Virgo* (1), the question raised was whether, under a power to pass by-laws "for regulating and governing hawkers or petty chapmen and others carrying on petty trades," the corporation were entitled to pass a by-law prohibiting hawkers from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised. The ground of judgment of the Privy Council, delivered by my noble and learned friend Lord Davey, was expressed in these terms, which seem to me to apply directly to this case. The general principle the result of the cases is "that a municipal power of regulation or of making by-laws for good government without express words of prohibition does not authorize the making it unlawful to carry on a

(1) [1896] A. C. 88.

lawful trade in a lawful manner." That principle seems to me to apply directly to this case.

I notice that Lord Adam in his judgment observes of the regulation in question: "The result is that it prevents owners or consigners of cattle from selling them by auction to such persons or at such prices as they please. There is no interference with sales by private bargain in any way. Now I can see nothing repugnant to the laws of Scotland in the *owners* of a public market so regulating their public market that only sales by auction open to the whole public shall be held therein." His Lordship thus finds the power to make the regulation, not in the right of administration, but the right of ownership of the market, and indicates that a similar regulation as to private sales would be ultra vires. To my mind it is clear, under the statutes, that the ownership of a market dedicated to public use gives no power to make by-laws, that power being conferred on the local authority alone, subject to the statutory restriction. If ownership gave the right, I see no reason for holding that a regulation of private sales would not be equally good.

Lord M'Laren again says: "If the by-law in question were applied to sales by private bargain, I should be disposed to hold that it would be an undue interference with the rights of a seller making use of the market to say that he should not be entitled to confine his dealings to persons belonging to his trade." I entirely agree with the views of these learned judges that a similar by-law prohibiting private sales, except on the conditions which have been imposed on sales by auction, would be repugnant to the law; but I am unable to distinguish in principle between the two cases, and no distinction in principle has been stated in the Court below, nor, I believe, by your Lordships.

It has been said that the appellants' claim is really one to have an additional facility given for making sales to one class only of purchasers. The same observation could be made as to the other cases I have given by way of illustration. But in truth the by-law complained of is a prohibition against free trading so long as no opportunity for free powers of sale is

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given, and while the by-law cannot be justified on the ground of want of accommodation.

For the reasons I have given I am, with deference to your Lordships, of opinion that a local authority, having the administration of the premises within which a market open to the public is held, have no right, acting only on their notions of what is for the public advantage, as the local authority has here done, under the statute of 1847 or otherwise, to make by-laws to interfere with the conditions on which sellers desire to dispose of their property, or buyers and sellers desire to contract. I think the appeal should be sustained, and that the appellants should have their costs here and in the Courts below.

LORD DAVEY. My Lords, I must admit that I have felt some hesitation in this case, but I have come to a clear conclusion that the judgment ought to be affirmed. No doubt the principle laid down in Lord Kinnear's opinion, and relied on by Mr. Balfour, is a perfectly sound and important one, namely, that the power of making by-laws entrusted to a municipal or other public authority is so given for the purpose only of better enabling them to perform their general duties, and ought not to be used for any collateral or outside purpose. And I agree that it is not the office of the market authority to make by-laws for the purpose of advocating or supporting particular views of public policy or economics. But I do not think that the by-law complained of is really open to objection on that score.

It is a little difficult to put into formal or precise language exactly what it is that the pursuers and appellants complain of, and which is said to be ultra vires. When you examine their complaint, I think it will be found to be that facilities are not provided for enabling them to carry on their business in the limited and peculiar manner which at present they find it their interest to adopt. The question, therefore, is whether there is any duty on the respondents to provide such facilities. Now I can only say that for myself I am not aware of any duty in a market authority to provide special facilities for every trader

who chooses to sell to a select and limited class of customers in carrying on his business in that manner, and I can find nothing to that effect in the Acts of Parliment which have been referred to. The duty of the market authority, as was said by Littledale J. in the *Islington Market Case* (1), is to keep the market open for the accommodation of the public who wish to buy or sell there. But there is not, in my opinion, any obligation to provide facilities for enabling particular members of the public to carry on their business in any special or unusual manner. Mr. Balfour said in the course of his argument that his clients were practically excluded from the market. This is, in my opinion, a fallacy, and a very common one. Persons are not excluded from the benefits provided for the public because, for good or bad reasons, they do not choose to avail themselves of those benefits on the terms on which they are offered to the public generally. I therefore come to the conclusion that there is no duty in the market authority to provide facilities for every special mode of dealing, although the same may be perfectly lawful.

The real complaint against the by-law is that it does not go far enough, because it provides no place for the appellants dealing; but that does not make it ultra vires. As was observed in the course of the argument, the words "on conditions of sale which shall be equally applicable to all bidders and buyers," and the words "or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying," might just as well have been left out, as they add nothing to what is included in the expression "public sales by auction." It would then stand thus: "The sale-rings shall be used only for public sales of cattle by public auction. The sales rings shall not be used for private sales." No objection could have been taken to the validity of a by-law in that form. It must be within their competence to reserve a place for public sales by auction, and that is really the only question before your Lordships in this appeal. The addition of the words which I have omitted does not seem to me to add anything to the sense of

(1) 3 Cl. & F. 513, 518.

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the by-law, though they have unfortunately given occasion for the argument that has been addressed to us. Indeed, I should myself have come to the same conclusion on the earlier by-law, for I should understand "sales by auction" in a by-law made by a market authority to mean sales by auction to which all members of the public are admitted to bid. It is not necessary to express any opinion whether, consistently with their duties to the public, the market authority could have provided for sales by auction from which a certain portion of the public were excluded.

Ordered that the appeal be dismissed with costs.

Lords' Journals, July 27, 1899.

Agents for appellants: *A. & W. Beveridge, for J. & D. T. Colquhoun, Writers, Glasgow, and J. Gordon Mason, S.S.C., Edinburgh.*

Agents for respondents: *Martin & Leslie, for Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

NAISMITH AND ANOTHER . . . . . APPELLANTS;

AND

BOYES AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.)
1899
July 28.

Succession—Will—Provision for Widow—Partial Intestacy—Terce, Jus Relictæ, and Legitim.

A testator by his will made a provision for his wife declaring it to be in full of all claims by her of terce and jus relictæ or otherwise. Through the death of certain devisees before vesting took place, the residue fell into intestacy:—

Held, affirming the decision of the First Division of the Court of Session, that the declaration was to be construed as excluding the widow's claim in so far only as conflicting with the will, and, an event happening which the testator never contemplated, the widow was entitled both to her provision and to terce and jus relictæ out of such heritables and movables as had fallen into intestacy.

APPEAL on a special case from a judgment of the First Division of the Court of Session, Scotland. (1)

The terms of the settlement in question and the facts set out in the special case are fully given in Lord Watson's opinion.

April 27, 28. *Balfour, Q.C.* (with him *Patrick Balfour*), (both of the Scottish Bar), for the appellants. The widow was not entitled to both her life-rent provision under the settlement and to terce and jus relictæ. She was put to her election to accept the provision in lieu of her legal claims, and she accepted the former. Intestacy made no difference, for the testator's declaration is to buy off all claims that may be made against his estate.

A. Graham Murray, L.A. (with him *A. S. D. Thompson*), (both of the Scottish Bar), for the respondents. The clause of exclusion is only a clause originating in a particular design or purpose of the testator, namely, to benefit some person or persons in favour of whom the property was given; and if

(1) (1898) 25 R. 899.

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the purpose be disappointed, then the clause is no bar to the widow's claim out of property which became undisposed of owing to that lapse. There was here no declaration of forfeiture in the event of the widow claiming her legal rights. The English cases are in favour of the respondents: see Williams on Executors, 9th ed. pp. 1361, 1362; *Pickering* v. *Earl of Stamford* (1), based upon *Sympson* v. *Hornsby* and *Sympson* v. *Hutton*, from a note taken from the registrar's book (2); *Garthshore* v. *Chalie* (3); *Lett* v. *Randall* (4); *Gurly* v. *Gurly*. (5)]

Balfour, Q.C., in reply.

The House took time for consideration.

July 28. EARL OF HALSBURY L.C. My Lords, in this case the testator, Mr. James Hamilton, conveyed the whole of his estate to trustees, making certain provisions in respect of his second wife (now Mrs. Boyes) and her two children. The appellant, Mrs. Naismith, is the daughter by Mr. Hamilton's first marriage. The sole point which is in debate is the true construction of one provision of the settlement made by Mr. Hamilton in which he declared that the provision he made for his wife and children by the settlement he was then making, and the provisions previously made for Minnie Arthur Hamilton (now Mrs. Naismith), "to be in full of all that my said wife can claim in name of terce, jus relictæ, or otherwise, and of all that my said children can claim in name of legitim, portion natural, bairn's part of gear, or otherwise, in respect of my death."

The children of the second marriage died under age. Both the respondent and the appellant accepted and enjoyed the provisions made for them.

It is argued that, though the portion of the estate in dispute has fallen into intestacy, the provision which I have quoted

(1) (1797) 3 Ves. 331, 332.

(2) 3 Ves. 334, 335, 336 a. *Sympson* v. *Hornsby* is also reported (1716) 2 Eq. C. Ab. 660; Prec. Ch. 452; and Hutton (1717) 2 Eq. C. Ab. 439; 11 Vin. Abr. tit. Exors. p. 185; 2 Vern. 721.

(3) (1804) 10 Ves. 1, 17, 18.

(4) (1855) 3 Sm. & Giff. 83.

(5) (1842) 8 Cl. & F. 743.

bars both the appellant in respect of her legitim and the respondent in respect of her jus relictæ from any further claim than that which they had respectively enjoyed under the settlement made by the testator.

On the other hand, it is said that the provisions made were intended only to apply to such part of the estate as was disposed of by the settlor, and could not be intended to apply to any rights arising from intestacy which was not contemplated by the terms of the settlement at all, and I think that is a reasonable and sensible view of the matter. To use the language of Lord M'Laren, with which I concur, such clauses are intended to enable full effect to be given to the testator's testamentary dispositions by putting all persons who take benefit from the will under a disability to put forward legal claims which would have the effect of withdrawing something from the estate disposed of.

As regards all that remains over when the provisions of the will are satisfied—in this case the whole residue—the law of intestacy takes effect upon it. This seems to me good sense, and I am satisfied that it gives effect to the intentions of the testator in the sense that he contemplated a state of things by the clause in question which as a fact did not arise, and that he never contemplated the clause as applying to intestacy at all.

My Lords, I think the judgment ought to be affirmed.

The parties have by their agreement settled the question of costs.

LORD WATSON (read by Lord Davey). My Lords, on December 22, 1891, the late James Hamilton made a mortis causâ settlement by which he conveyed to trustees the whole estate heritable and movable of which he had power to dispose. He had at that time a second wife, now the respondent Mrs. Boyes, and two living children of the second marriage, a daughter and a son. He had also one child by a former marriage, now the appellant Mrs. Naismith, for whom he had already made a provision of 3000*l.*, as recited in his settlement.

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By the terms of this settlement Mr. Hamilton directed his trustees to pay the free annual income of the whole residue of his estate to his widow, for her alimentary life-rent, to be restricted to one-half of the free income in the event of the widow entering into another marriage. After the fulfilment of these purposes the trustees were directed to hold the residue for behoof of the children of the testator's second marriage and the issue of such as might predecease until the youngest of the children had attained the age of twenty-one years; and, upon that event, to divide, pay, and convey the residue of the estate among the children of the second marriage, "and that equally among such children then surviving and the issue of such as may have predeceased, per stirpes, that is such issue taking only the share which their parents would have taken if in life." The settlement contained no destination over of the residue in the event of the failure of the children of the second marriage or their issue before the period appointed for distribution.

The settlement also contained the following declaration, which has been the occasion of controversy in this case: "And I declare the provision hereby made for my wife and the children of our present marriage and the provisions previously made for the said Minnie Arthur Hamilton (the present appellant) to be in full of all that my said wife can claim in name of terce, jus relictæ, or otherwise, and of all that my said children can claim in the name of legitim, portion natural, bairn's part of gear, or otherwise in respect of my death."

The testator died on January 29, 1892, survived by his wife and by the children of both marriages. The children of the second marriage died in pupillarity upon May 14 and 20, 1892. The widow was married to her present husband upon July 8, 1896, and thereupon her interest in the free income of the residue became in terms of the settlement restricted to one-half. The appellant and the respondent after the testator's death accepted the provisions which had been made for them respectively which were declared by the settlement to be in full of their legal claims.

In July, 1897, the appellant and the respondent concurred in stating a special case for the opinion and judgment of the First Division of the Court of Session to which the trustees of the testator were formally made parties, but not as claimants. The estate submitted to the jurisdiction of the Court consisted of one-half of the free residue of the trust estate in which the respondent had lost her alimentary right of life-rent upon her re-marriage in July, 1896. The respondent (1.) maintained that by the terms of the settlement the whole residue vested a morte testatoris in her two children, and that she succeeded on their deaths successively to one-third of their interest; and (2.) in the alternative, that on their deaths the residue, in so far as not affected by her life-rent, fell into intestacy, and that accordingly she was entitled to her legal rights of terce and jus relictæ therein.

The appellant, on the other hand, contended that her own claim of legitim and the respondent's claims of terce and jus relictæ were effectually barred by the terms of the clause already quoted from the settlement, and by their subsequent acceptance of the provisions respectively made for them by the testator; and that the appellant was therefore entitled, as the sole heir ab intestato of her father, to take the half of residue which had been set free by the restriction of the respondent's alimentary life-rent.

The residue held by the trustee of the deceased consists of a house and small leasehold property, together about the value of 1600*l.*, and of personal estate amounting to 5407*l.* 3*s.* 5*d.* It is not stated in the special case that the testator died infeft in the heritable property; but the Court, apparently without objection by the parties, have proceeded upon the footing that he was so, and that the widow's claim of terce was, if not barred, as the appellant maintains, well founded.

The judgment of the First Division was delivered on May 27, 1898, by Lord M'Laren, with the concurrence of the Lord President (Lord Robertson), Lord Adam, and Lord Kinnear. Their Lordships negatived the respondent's contention that the residue had vested in the two children of the second marriage; and, as neither of the parties to this appeal has attempted to

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disturb the finding, I do not think it necessary to say more than that I agree with it. By their interlocutor (1) they affirmed (1.) that "the whole residue passed to the testator's heirs in intestacy as at the date of his death," and (2.) that the respondent, the testator's widow, is entitled to her legal rights of terce and jus relictæ out of any estate which may have fallen into intestacy, in addition to the life-rent provision conferred upon her by the settlement. Their Lordships have thus distinctly affirmed that the legal claims of the respondent are not barred by the clause of the settlement already referred to; but their interlocutor does not make the same affirmation with respect to the appellant's claim of legitim. So long as the respondent only takes one-third as jus relictæ, it is not material to the appellant, in so far as the movable estate is concerned, whether she takes in the capacity of her father's heir, or in the double capacity of his heir and of a child entitled to legitim. If the appellant's right of legitim was barred, and the respondent's legal claims were not, the result would be that the respondent would take one-half instead of one-third share of the movable estate. The reasons which the learned judges have assigned for holding that the respondent is not barred from claiming her legal rights apply with the same force to the appellant.

The legal claims of the widow and children are not, strictly speaking, rights of succession, and they infer no representation. They are in the nature of debts, which attach to the free succession after the claims of onerous creditors have been satisfied. Hence, it has been frequently said judicially that, in respect of their legal claims, the widow and children are heirs in competition with onerous creditors, and are creditors in competition with heirs. The widow's terce is one-third of the income of the heritage in which her husband died infeft. Her jus relictæ is one-third of the corpus of his movable succession, when he is survived by children, and when he leaves no children is one-half. The legitim, in like manner, is one-third when there is a surviving widow and one-half when there is not. The other third or half, as it may be, of the

(1) 25 R. 899.

movable succession descends, by right of inheritance, to the heir or heirs ab intestato of the deceased.

The Lords of the First Division have based their judgment in substance upon the ground that the clause declaring the provisions respectively made by him in favour of the respondent and the appellant to be in full of their legal claims has exclusive relation to property passing by mortis causâ disposition from the testator, and that it has no reference to, and does not affect, property which he attempted to dispose of by will, and which has fallen into intestacy by reason of the failure of the objects of the bequest. At the hearing of the appeal I entertained doubts whether that conclusion could be justified; but since that time I have had an opportunity of considering the question, and I am satisfied that, whilst the decision of the Court below does not run counter to any authority which I have been able to find in the law of Scotland, it is in accordance with sound principle.

In a case like the present, where the testator settled upon the members of his family all the property, both heritable and movable, of which he was possessed, I do not think it can be reasonably assumed, in the absence of any provision to that effect either express or implied, that he intended to regulate the disposal of any part of his estate which might possibly lapse into intestacy. In my opinion the testator, when he inserted a clause in his settlement barring the legal rights of the appellant and respondent, had no object in view except to protect the settlement, by preventing the enforcement of these claims to the disturbance of his will and to the detriment of the beneficiaries whom he had selected. When accordingly, by the premature decease of his children of the second marriage, the residue provided to them by his settlement became intestate, I do not think it can be held that the testator contemplated, or intended, that the exclusion of the legal rights of his widow and surviving child should any longer remain operative. I have, therefore, come to the conclusion that, in the events which have occurred, the property destined by the will to the children of the second marriage, whilst still affected to the extent of one-half of its income by the

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provisions of the will, devolved upon the legal heir of the testator subject to the legal claims of his widow and children which would have been competent if he had died intestate.

It must, I apprehend, in all cases be a question of circumstances how far a testator, who has in his settlement excluded the legal claims of his widow and children, intended that exclusion to operate. He may expressly declare, or it may appear by plain implication from the terms of the instrument, that he intended the provision to operate, not merely in favour of persons taking under the will, but also in favour of his heirs succeeding in the event of intestacy. There may be, and there frequently is, a general scheme of settlement of a man's whole property which contemplates that some relatives shall, upon his decease, take the interest which the law gives them as heirs ab intestato, and that others shall take the provision which the deceased has made for them. It is unnecessary for the purposes of this case to consider what would be the effect of an express provision to the widow or to one child coupled with an exclusion of their legal claims. The exclusion would certainly operate in favour of all those beneficiaries who took provisione of the deceased, and it would also operate in favour of those taking ab intestato if it were reasonably apparent that denying effect to it would disturb the scheme which the deceased contemplated.

The learned judge who delivered the opinion of the Court by some oversight made use of the expression, "There are no heirs or personal representatives other than the wife and children." I need hardly explain that the widow is neither the heir nor the personal representative of her husband. The child, on the other hand, in so far as it has a claim of legitim, is a creditor and is not the heir of its father, but has besides a right of inheritance. The father may in various ways exclude its claim of legitim, but he cannot take away its right of inheritance except by making an effectual conveyance or bequest of his estate to another. With these observations I concur in the opinion of the learned judge, and in his conclusion "that the residue in so far as consisting of personal estate is subject to the usual threefold division, and that the residue

of the heritable estate is subject to terce." Although the questions submitted in the special case do not expressly raise the point, I think the interlocutor ought to contain a declaration that the appellant is entitled to her legitim.

I have not thought it necessary to refer to *Pickering* v. *Earl of Stamford* (1), *Gurly* v. *Gurly* (2), or to any of the other English cases which were cited by the Lord Advocate in his argument for the respondent. These authorities, although they may have an apparent affinity to, do not directly bear upon the question raised in this appeal, which relates to the sense in which certain expressions were used by a Scottish testator, having due regard to the nature of the rights with which he was dealing as these exist in the law of Scotland. The rights given to an English widow by the Statute of Distributions differ materially from a Scottish widow's claims of terce and jus relictæ, and an English child possesses no right analogous to a Scottish child's claim of legitim.

I am of opinion that the interlocutor appealed from ought to be affirmed with the declaration that the appellant's (Mrs. Naismith) right to have her claim of legitim satisfied out of the fund in medio is not barred by the terms of her father's settlement. In terms of the agreement embodied in the special case both parties must have their costs of this appeal out of the funds in medio.

LORD SHAND. My Lords, I also think that the judgment of the Court of Session ought to be affirmed with the addition proposed by my noble and learned friend Lord Watson in the concluding passage of his opinion.

As pointed out by my noble and learned friend, the Court has held that no vesting of the estate took place in the children of the second marriage who survived the testator. He contemplated that his whole estate should be given to those children, but he had made a provision that the payment should be made only if they survived majority. They died in minority, and there is no ulterior destination. In these circumstances the Court has held, as I think rightly, that the testator died

(1) 3 Ves. 331, 332. (2) 8 Cl. & F. 743.

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intestate in regard to the estate which is now the subject of this appeal.

My Lords, the sole question is as to the effect of the clause by which the testator provided and declared that "The provisions hereby made for my wife and the children of our present marriage, *and the provisions previously made for the said Minnie Arthur Hamilton*" (the daughter by the first marriage), "to be in full of all that my said wife can claim in name of terce, jus relictæ, or otherwise, and of all that my said children can claim in name of legitim, portion-natural, bairn's part of gear, or otherwise in respect of my death." Upon the effect of that clause I agree with what has fallen from your Lordships. It must be observed that the case is not one in which in return for other advantages given to them the widow and the child of the first marriage contracted to give up the rights which they had of jus relictæ and legitim respectively. There is no obligation or contract to give up legal rights on the part of either the widow or the child such as might occur either by a contract made by themselves or as the effect of a parent's contract of marriage. The question is one purely of testamentary intention—that is to say, of the true interpretation and effect of the will which the deceased made.

My Lords, suppose the testator had expressly said, "In order to benefit the children of my second marriage and leave them the whole estate, I provide that the claims of legitim and jus relictæ shall be barred." If he had thus expressly stated that his purpose was to benefit his children, and it turned out that he died intestate, as the testator has done in this case, I think there can be no question that a clause of that kind excluding the rights of the widow and children would have been of no effect. But although that is not expressly said, I hold it to be clearly there by implication. The true meaning of the clause excluding the rights of the widow and children is to protect the provisions in the settlement; but if those provisions entirely fail, it appears to me that in consequence and by direct implication the declarations in regard to the rights of the widow and the children fail also.

My Lords, I will only add that it appears to me that the

principle to which the House, affirming the decision of the Court below, is now giving effect is one which is established in the law of England. The Lord Advocate, in the able argument which he submitted to the House, referred to a case which my noble and learned friend Lord Watson has also already noticed, namely, *Pickering* v. *Earl of Stamford.* (1) I find that it was there decided by the Master of the Rolls in 1797, following a decision by Lord Cowper, that "where a testator had given to his wife that provision which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion no other person should set it up against the widow." That seems to me to be exactly the principle to which the House is now giving effect; and I think the passage to which the Lord Advocate also referred in Williams on Executors, p. 1360, states the rule with accuracy and great clearness. It is true that in this case the claims to legitim and jus relictæ are of a different character from a mere beneficiary right, as my noble and learned friend Lord Watson has pointed out; but the question is not one as to the nature of the claim, whether it is a right given by common law, a right such as jus relictæ or legitim where there is a jus crediti, or a right of succession under the Statute of Distributions or otherwise. In either case the purpose which the testator has in view is to exclude the claims, whatever may be their nature or origin and foundation, in order to benefit others. If the benefit to those others is entirely to fail, it is clear that in conformity with the English decisions and, as I think, with sound principle, the exclusion of the right, whatever be its character, also fails—for the exclusion of the right was provided only to protect and enlarge the purpose of the testator in making his testamentary provisions, whereas these provisions have failed, and he has died intestate.

LORD DAVEY. My Lords, I cannot say that I concur in the judgment of your Lordships without hesitation. It is surprising that there is no authority upon the point in Scottish law;

(1) 3 Ves. 331, 336 a.

H. L. (Sc.) 1899 NAISMITH v. BOYES. Lord Davey.

but none was cited, and the case must therefore be decided on principle.

My doubt arises upon the particular character of jus relictæ, and from a consideration that under the decision appealed from the widow takes both the provision made for her by her husband in bar of her legal right, and also her jus relictæ. I need not repeat what has been said by my noble and learned friend Lord Watson as to the nature and incidents of the jus relictæ. I will only observe that it is totally different from a share of the deceased's estate as one of his heirs in mobilibus, and it exists equally whether the deceased has died testate or intestate, and may be asserted equally against testamentary heirs and against statutory heirs in mobilibus. For this reason the English case *Pickering* v. *Earl of Stamford* (1), cited by the Lord Advocate, does not seem to me to support his argument. In that case it was held that a widow was not deprived of the share in her husband's intestate estate to which she is entitled under the English Statute of Distributions by a clause of exclusion in his will, the dispositions of which have failed and resulted in an intestacy. That was decided on the ground that a person cannot alter the legal succession to his intestate estate except by giving it to somebody else which ex hypothesi he has not done. Indeed, the case of *Pickering* v. *Earl of Stamford* (1) contains one sentence which is adverse to the argument. The nearest analogy in English law to jus relictæ is a widow's right to dower under the old law which was independent of any question of intestacy, but which might be barred in the same manner and to the same extent as jus relictæ by the husband's disposition. Lord Alvanley says: "If a man devises his real estate from his heir after giving his widow a provision in lieu, satisfaction, and bar of dower, and the devisee dies in the lifetime of the devisor, is there any doubt that the heir would take the estate and bar the widow of her dower? That is not doubted." My Lords, that sentence I believe to express the doctrine of English law.

The real question seems to me to be whether the testator must be presumed to have purchased his widow's jus relictæ

(1) 3 Ves. 331, 332.

for the benefit of his particular disponees only or for the benefit of his estate generally, and it appears to me to be one of those questions which may be decided either way without infringing either principle or authority. The testator has made a complete disposition of the capital of his estate in a certain contingency only, and has made no disposition in the event of that contingent gift failing. I do not know why he should not be deemed to have contemplated the failure of the contingency and to have elected in that event to die intestate. I understand, however, that all your Lordships agree in the result with the learned judges in the Court of Session, and I need scarcely say that in these circumstances the decision is most likely to be in accordance with sound principle and the presumed intention of the testator. I therefore concur in the order proposed.

Ordered, that the order appealed from be affirmed, that this appeal be dismissed, and that the costs of both parties in the appeal be paid out of the funds in medio. Further ordered, that it be declared that the appellant, Mrs. Naismith's, right to have her claim of legitim satisfied out of the fund in medio is not barred by the terms of her father's settlement.

Lords' Journals, July 28, 1899.

Agents for appellants: *A. & W. Beveridge, for Carmichael & Miller, W.S., Edinburgh, and Hugh L. Wilson, Solicitor, Alloa.*

Agents for respondents: *Grahames, Currey & Spens, for A. C. D. Vert, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1899 July 25.

THE MAGISTRATES AND COUNCIL OF LEITH . . . . . } Appellants;

AND

THE COMMISSIONERS FOR THE HARBOUR AND DOCKS OF LEITH } Respondents.

Burgh—Public Health (Scotland) Act, 1867 (30 & 31 *Vict. c.* 101), *s.* 95—*Rates—Ultra Vires—Costs of opposing Bill in Parliament.*

The magistrates and council of Leith, who were also the local authority for public health, incurred costs in opposing in Parliament a bill for amalgamating the burghal territory of Leith and Portobello with an enlarged district subject to the government of the new and extended corporation of the city of Edinburgh, and they succeeded in having the bill thrown out as regards Leith:—

Held, affirming the decision of the Second Division of the Court of Session, that it was ultra vires of the magistrates to include the expenses of the opposition in the public health assessment as expenses "incurred in executing" that act.

Attorney-General v. *Mayor of Brecon*, (1878) 10 Ch. D. 204, distinguished.

Appeal from an interlocutor of the Second Division of the Court of Session, Scotland (1), affirming the interlocutor of the Lord Ordinary (Lord Pearson).

The following statement of facts is taken from the judgment of Lord Watson.

The appellants were the magistrates and council of Leith. Besides the ordinary legal powers which attach to them as the municipality of the burgh, they have been entrusted by the Legislature with the execution of a variety of statutory trusts. They are commissioners for executing the provisions of the Burgh Police (Scotland) Act, 1892; they are also the local authority within the burgh for executing the provisions of the Roads and Bridges (Scotland) Act, 1878; the Public Health (Scotland) Act, 1867, and Acts explaining and amending the

(1) (1897) 25 R. 126.

same; the Housing of the Working Classes Acts, 1890–1896; the Valuation of Lands (Scotland) Act; the Registration of Voters (Scotland) Act; the Registration of Births (Scotland) Act; the Public Parks (Scotland) Act; the Cattle Diseases (Scotland) Act; and for assessing within Leith for the purposes of the Water of Leith Purification and Sewerage Act, 1889.

Besides levying assessments in virtue of their statutory powers, the appellants, as the corporation of the burgh, are the owners of heritable property of the annual value of 35*l.*, and of the estimated capital value of 845*l.* They have also a right to receive, in perpetuity, from the respondents, the Commissioners for the Docks and Harbour of Leith, an annual payment of 500*l.*, less income tax. That charge was imposed upon the respondents by the Docks and Harbours Act of 1847, and is payable, in lieu of certain rates formerly due to the burghal corporation of Leith, out of the rates levied at the harbour of Leith, which were commuted at the sum of 500*l.* a year, by the Edinburgh and Leith Agreement Act, 1838. The Act of 1838 provided that the commuted sum should be "applicable and applied to the municipal and civil and other purposes of the said town, as its own proper estate, funds and effects," and, by the Harbour Act of 1847, it was declared that the annuity of 500*l.* should be "applied and administered by the said magistrates and council to and for such and the like purposes as the said customs, rates, imposts, and market dues hereby abolished, were applicable and applied."

The respondents, who were the complainers in this action, are the statutory trustees of the harbour and docks of Leith. They are liable to be assessed by the appellants for the purposes of the Public Health (Scotland) Act; but they are by statute exempt from the burgh general assessments, and also from assessment under the Roads and Bridges Act, 1878, and the Water of Leith Purification and Sewerage Act, 1889. The assessment imposed under the Public Health Act is leviable from owners and occupiers in equal proportions.

In the parliamentary session of 1896 the municipal corporation of the city of Edinburgh promoted a bill, the main object of which was to extend the boundaries and jurisdiction of the

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city by the amalgamation with the city of the burghs of Leith and Portobello. The effect of the bill, if it had become law, would have been to terminate the existence and to put an end to all the powers, duties, and privileges of the municipal corporation of Leith. It proposed that the burghal territory of Leith and Portobello should form part of an enlarged district subject to the government of the new and extended corporation of the city of Edinburgh; and that all the statutory powers and trusts previously exercised by the magistrates and council of Leith and Portobello should be transferred in bulk to, and should be administered by, the new municipality.

The bill became law in so far as it related to the burgh of Portobello. It was keenly opposed by the appellants; and ultimately, with the exception of certain provisions, it was thrown out, in so far as it concerned the burgh of Leith and its municipality.

The appellants, in their opposition to the bill, which was conducted by the magistrates and town council in their municipal character, incurred costs to the amount of about 3500*l.* And they, at a statutory meeting in October, 1896, resolved to charge the rates leviable within the burgh of Leith, under the Public Health Acts, with an amount sufficient for payment of their parliamentary expenses. They accordingly proceeded to include the sum of 703*l.* 9*s.* 1*d.*, being one-fifth of the amount, in the assessment under the Public Health Acts for the year 1896–1897, leaving the balance of 2813*l.* 16*s.* 4*d.* remaining "to be assessed for in the four succeeding years, conform to resolution of council of date 6th October, 1896."

On November 6, 1896, the respondents presented the note of suspension and interdict with which these proceedings commenced, which was passed, with answers for the appellants, on November 18, 1896. The note craved the Court to interdict and prohibit the appellants from proceeding to carry the aforesaid resolution into effect, and from levying, under or in virtue of the Public Health Acts, any rate or assessment on the properties of the respondents within the burgh of Leith, to be applied directly or indirectly in or towards payment, in whole or in part, of the expenses incurred by the appellants in or

connected with the opposition by them to or in connection with the bill promoted by the corporation of Edinburgh in the session of Parliament, 1896, for the extension of the boundaries of the said city, and the amalgamation of the burghs of Leith and Portobello therewith, or in or towards payment of money borrowed or to be borrowed by them for the purpose of paying the said expenses.

The Lord Ordinary (Lord Pearson) having closed the record upon the note and answers, and heard the parties, on July 16, 1897, pronounced an interlocutor, suspending the proceedings complained of, and interdicting, prohibiting, and discharging the present appellants from imposing and levying, and from proceeding to carry out a resolution to impose and levy on the complainers, "any rate or assessment on the properties within the said burgh, or on any rental or valuation thereof, to be applied directly or indirectly in or towards payment, in whole or in part, of the expenses incurred by the present appellants in or connected with opposition by them to or in connection with the bill promoted by the corporation of the city of Edinburgh . . . . or in or towards payment of money borrowed or to be borrowed by them for the purpose of paying said expenses." A reclaiming note was presented to the Second Division by the appellants, when the Court, consisting of the Lord Justice Clerk (Lord Macdonald), Lord Trayner, and Lord Moncreiff, refused the note, and adhered to the interlocutor of the Lord Ordinary. (1)

1898. July 28, 29; Aug. 1. *Balfour Q.C.* (of the Scottish Bar), and *Cripps Q.C.*, for the appellants. In the appellants' opinion there are only two funds under their control out of which the expenses of opposing the Edinburgh Extension Bill could come—the fund called the "Common Good," and the public health assessment. If these expenses are paid out of the former it will take seven years to pay them, and the "Common Good" will be exhausted and the appellants left with no funds available for defence against future bills. On the other hand, the bulk of the case for the City of Edinburgh Bill

(1) 25 R. 126.

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was rested on the grounds of public health and upon sanitary questions. Further, the assessment under the Public Health Acts being leviable equally from the owner and occupiers, the burden would be equally distributed on the ratepayers within the burgh who equally derive benefit from the successful opposition conducted by the appellants. It is settled law that a burgh, corporation, or trust is entitled to defend itself against attack, particularly if its existence is in question, and to defray the expenses legitimately incurred in so doing out of the burgh, corporation, or trust funds or rates under the administration of these bodies. See *Brighton* v. *North* (1); *Attorney-General* v. *Mayor of Wigan* (2), and the opinions of the Lord Justice-Clerk Moncreiff in *Perth Water Commissioners* v. *M'Donald* (3) and Jessel M.R. in *Attorney-General* v. *Mayor of Brecon.* (4) Sect. 95 of the Public Health (Scotland) Act, 1867, provides that the charges and expenses incurred by the local authority in executing this Act may be defrayed out of the assessment called the public health assessment. The section must receive a fair construction, and cannot be limited merely to the express purposes mentioned in the Act. If the opposed bill had become law in its original form the execution of the Public Health Acts by the appellants as local authority within the burgh would have been absolutely subrogated, for the whole scope and entire purpose of the bill was to transfer the administration, not only of the Public Health Acts, but of the Roads and Bridges Act and all the other Acts administered by the appellants from the burgh of Leith to the extended burgh of Edinburgh. The respondents rely on the Municipal Corporations (Borough Funds) Act, 1872 (35 & 36 Vict. c. 91); but that Act does not apply to Scotland, and indeed its whole machinery is primâ facie inapplicable to Scotland.

[They also commented upon *Reg.* v. *Mayor of Sheffield* (5); *Wakefield* v. *Commissioners of Supply of the County of Renfrew.* (6)]

(1) (1847) 16 L. J. (Ch.) 255.
(2) (1854) 23 L. J. (Ch.) 429; 5 D. M. & G. 52.
(3) (1879) 6 R. 1050, 1056.
(4) 10 Ch. D. 204, 223.
(5) (1871) L. R. 6 Q. B. 652.
(6) (1878) 6 R. 259.

Guthrie, Q.C., and *J. W. Sym* (both of the Scottish Bar), for the respondents. The expenses in question should be taken from the "Common Good" fund. The respondents contend, though they do not press the point, that the Municipal Corporations (Borough Funds) Act, 1872, does apply to Scotland. But on the main point, the expenses in question were not incurred in promoting the interests of Leith in the matter of public health. The contest in Parliament was whether Edinburgh and Leith were so much one community that the affairs of the citizens could be managed by one town council instead of by two. It was not a question of administration. It was a question who the trustees for administration were to be. It follows that the expense of defending that separate existence was not an expense in executing the Public Health (Scotland) Act, 1867, which was an Act for the removal of nuisance—prevention of disease, regulation of common lodging-houses—provisions for sewers, drains, and water supply. *Brighton* v. *North* (1) does not apply, for there the trustees were defending the trust estate itself from a physical injury; and the same remark applies to *Attorney-General* v. *Mayor of Brecon.* (2) There it was shewn that the town had used the burgh funds to protect the burgh from what might be termed a nuisance, namely, slaughter-houses. Then *Reg.* v. *Mayor of Sheffield* (3) is a strong authority that even meritorious and successful opposition to a bill affecting a corporation will not necessarily enable trustees of the corporate fund to use it in such a manner. See also *Cowan and Mackenzie* v. *Law* (Edinburgh Water case). (4)

Balfour, Q.C., in reply.

The House took time for consideration.

1899. July 25. EARL OF HALSBURY L.C. My Lords, I have had an opportunity of reading the judgment written by one of my noble and learned friends (Lord Watson), and I am quite prepared to assent to it. The only reason why I wish to say something further is that some of the learned judges below have

(1) 16 L. J. (Ch.) 255.
(2) 10 Ch. D. 204, 223.
(3) L. R. 6 Q. B. 652.
(4) (1872) 10 M. 578.

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made comments upon a decision of Sir George Jessel. As I agree with that decision, I have thought it right to say that in my opinion a broad distinction exists between the case which the learned judges in the Court below had to deal with and the case which Sir George Jessel had to deal with. It is one thing to be entitled to defend your own municipality out of your own funds, and it is another thing to apply to that purpose funds which are confided to you for a totally different purpose. My Lords, it seems to me that that establishes the whole difference here, and while I entirely agree with Sir George Jessel, and protest against the weight of his authority being in any degree shaken or moved by the judgment which your Lordships are about to pronounce, I am content in this particular case to affirm the judgment of the Court below, because in my view the distinction which I have pointed out exists between the cases, and therefore the judgment of the Court below is one with which I am able to agree.

LORD WATSON. [Lord Watson's judgment was read by Lord Davey, and after stating the facts as above the judgment continued:—]

The appellants, in their legal capacity as the municipality of the burgh of Leith, constitute a corporation or person capable of holding heritable and personal estate, and of contracting debts and obligations, quite independently of the position which they occupy as trustees for the execution of various legal powers under the authority of Parliament. It was held by the First Division of the Court in *Wotherspoon and Hope* v. *Magistrates of Linlithgow* (1) that a burgh, as a legal person, is liable, at the instance of a qualified creditor, to sequestration under the provisions of the Bankruptcy (Scotland) Act, 1856. Under that process the whole property of the burgh, so far as alienable, vests in the trustee in the sequestration, who distributes it among creditors according to their respective rights. But the right of the trustee in the sequestration does not extend to such statutory trusts as are created by the Public Health Acts, or to the statutory power of imposing and levying rates, which

(1) (1863) 2 M. 348.

remain vested, notwithstanding the sequestration, in the municipal corporation of the burgh. It had been held in *Hogan* v. *Wilson and Magistrates of Musselburgh* (1) that under the Scottish Bankruptcy Acts prior to 1856 a burgh could not be made notour bankrupt; but the Court of Session had finally decided that it was competent to award sequestration in the usual form of the burgh estate, and to appoint a judicial factor: see *Beck* (*Judicial Factor*) v. *Burgh of Lochmaben*. (2)

I am not surprised that in the present case the learned judges of the Court of Session, finding the appellants possessed of burgh property sufficient or nearly to meet their obligations, should have declined to allow them to select a particular one of the statutory trusts administered by them, and to apply the moneys of the ratepayer for the purpose of discharging the debt of the burgh. It appears to me to be out of the question to say that heritable property to the value of upwards of 800*l.* and a perpetual annuity of 500*l.* are insufficient to enable the owner to provide for a debt of 3500*l.* It, on the other hand, does not appear, and it has not even been pleaded in the appellants' case, that the burgh property in question has been so dedicated as to be in whole or in part inalienable. The annuity of 500*l.* was declared by the Edinburgh and Leith Agreement Act of 1838 to be applicable to "the municipal and civil and other purposes of the said town (Leith) as its own proper estate, funds, and effects." The appellants have not shewn that the property in question is devoted inalienably to other purposes than payment of their debt, and I do not think that the considerations which led to the decision of *Beck* (*Judicial Factor*) v. *Burgh of Lochmaben* (2) and *Kerr* v. *Magistrates of Linlithgow* (3) have any application to the present case.

The authorities relied on by the appellants were English, and, what to my mind is of more importance, they all related to cases where the municipal corporation had appeared in their character of trustees to defend the interests of a statutory trust which had been assailed. I have certainly no repugnance to

(1) (1853) 15 D. 417. (2) (1836) 14 S. 1056; (1841) 4 D. 16.
(3) (1865) 3 M. 370.

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the equitable doctrine that a trustee who honestly acts in defence of the trust which he administers ought to be kept indemnis out of the funds of the trust; but no English or other authority has been cited to us in which a trustee, who has incurred costs in defending himself or his own interest, has been found entitled to recoup himself out of the pocket of a cestui que trust. In the present case the bill promoted by the corporation of the city of Edinburgh aimed at the destruction of the municipal corporation of Leith. It had not for its object the destruction, alteration, or impairment of any one of the numerous statutory trusts administered by the Leith Corporation beyond the abolition of the latter body. If that object were effected, the ratepayers would have remained in the same position, under the management of the extended corporation, in the election of which they would have had a voice.

I am, on these grounds, of opinion that the interlocutor appealed from ought to be affirmed with costs.

LORD DAVEY. My Lords, speaking for myself, I so entirely concur in the judgment which I have just read of my noble and learned friend Lord Watson that I do not intend to trouble your Lordships at any length. I only desire to make one observation. I do not understand my noble and learned friend to have said anything in the judgment which I have read to impugn the correctness and authority of the decision of Jessel M.R. in the case of *Attorney-General* v. *Mayor of Brecon* (1) in the cases to which that decision is applicable. This case, in my opinion, differs in essential particulars from the *Brecon Case*. (1) In that case the question was whether the corporation could pay the expenses of resisting an attack upon their corporate privileges and duties out of the borough fund. In this case it is not disputed that the corporation of Leith might lawfully defend themselves against an attack upon their existence out of their proper funds. Lord Moncreiff put the question thus in the Court of Session: "The true question which we have to decide," he says, "is not whether

(1) 10 Ch. D. 204.

the respondents were entitled to defend their corporate existence, but whether the expenses of their opposition are to come out of this particular fund."

Therefore, my Lords, the question is whether the corporation of Leith can lawfully charge the expenses of resisting the bill of the corporation of Edinburgh on the rates leviable by them under the Public Health Act, which they administer for the purposes of that Act independently of their ordinary rights, privileges, and duties. I am of opinion that they cannot, and therefore I concur in the judgment which has been proposed.

LORD SHAND. My Lords, your Lordships are about to affirm the decision of the Second Division of the Court of Session, which again unanimously affirmed the judgment of the Lord Ordinary; and as I concur in the views expressed by my noble and learned friend Lord Watson, I shall content myself by making a very few observations.

Whether it would have been possible for the appellants, whose existence as a town council was threatened by the bill which they successfully opposed, to have made some division of the expenses incurred, and to have framed a scheme of allocation and equitable distribution of these expenses or part of these expenses, by requiring contributions by way of assessment from each of the various funds which they are entitled to raise in respect of the different trusts they administer, and in this way to impose an assessment to a small extent under the Public Health Act, as well as an assessment on funds of the other trusts, and of the corporation, it is not necessary to consider. I quite agree that there is no possible ground on which it can be successfully maintained that the whole assessment can be levied under the public health statute. The existence of the burgh was at stake, for its absorption into Edinburgh was proposed; and I see no reason to doubt that the appellants are entitled to be indemnified out of the capital funds of the burgh for the costs incurred in resisting that proposal. I concur, however, in thinking that the appellants were not entitled to impose a rate under the Public Health Act alone for that object, for these costs, if they could be said to

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be to some extent incidental to the carrying out of the purposes of that act, were so to a small extent only; and while agreeing with the views of my noble and learned friend and of your Lordships, I may add that Lord Trayner has stated shortly and clearly the grounds on which I am ready to rest my decision.

Ordered that the appeal be dismissed with costs.

Lords' Journals, July 25, 1899.

Agent for appellants: *John Kennedy, W.S., for Irons, Roberts & Co., S.S.C., Leith.*

Agents for respondents: *Martin & Leslie, for Torry & Sym, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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BOWMAN AND OTHERS . . . . . APPELLANTS;

AND

JANET BOWMAN (OR GEDDES) AND OTHERS . . . . . } RESPONDENTS.

Succession—Vesting—Postponed Period of Distribution—Conditional Institution.

A testator directed his trustees to allow his widow the life-rent use of his house and such allowance as they thought necessary, and "on the dissolution and winding-up of the firm of B. & Co." (of which he was a partner), "in the event of the predecease of my said wife, and if she then survives, on her death, to realize my whole means and estate and to divide the same into four equal shares, and pay one share to each of my children" A., B., C., and D., "or to their respective heirs." The widow survived the testator, and the firm had not been wound up. C. and D. survived the testator, but were dead:—

Held, affirming the decision of the First Division of the Court of Session, but not on the same reasoning, that the interests of all the children were not in suspense, but had vested a morte testatoris.

APPEAL from a judgment of the First Division of the Court of Session, Scotland. (1)

(1) (1898) 25 R. 811.

The following statement of the facts is taken from the judgment of Lord Davey.

"The testator, Lawrence Bowman, was at the time of his death a partner in the firm of Bowman & Co., coal-masters. By the contract of copartnery, made between the testator and his partners, and dated May 20, 1871, the partnership was to last during the term for which the colliery tacks or leases then held by the partners should be in subsistence, and by the 11th article it was declared that in case of the decease of any partner the copartnery should not then come to an end (unless the representatives of the deceased partners should so desire), but that the representatives of the deceased partner should come in his place and succeed to his rights and liabilities.

"By his will, dated March 17, 1882, the testator vested his whole estate, including his interest in the firm of Bowman & Co., in trustees. He gave to his widow the life-rent, use, and enjoyment of his dwelling-house and furniture, and such allowance as his trustees might consider necessary for the maintenance and support of herself and such of the testator's daughters or their children as might be living in family with her, and in event of her death he made similar provisions during the subsistence of the firm of Bowman & Co. for his daughters, Miss Isabella Bowman and Mrs. Geddes, and the children of the latter. By the tenth purpose he empowered his trustees, as representing him in the said firm of Bowman & Co., to be parties to any new lease or leases which the said firm might consider it expedient to enter into. The eleventh purpose is in the following words:—

"'On the dissolution and winding-up of the said firm of Bowman & Co., in the event of the predecease of my said wife and if she then survives, on her death, I direct my trustees to realize my whole means and estate, and to divide the same into four equal shares, and pay one share to each of my children, Archibald, Janet, Robert, and Isabella, or to their respective heirs.'

"These are the words which your Lordships are called upon to construe.

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"The testator died on September 22, 1882. His daughter Isabella died on July 28, 1891, and his son Robert on June 1, 1893. The widow is still living.

"The longer of the two leases in existence on the testator's death expired on Whitsunday, 1892, but the trustees of the testator have joined with the other partners in taking new leases of the collieries carried on by the firm for terms the last of which will not expire until Whitsunday, 1912."

The respondents, trustees under a settlement left by the deceased Isabella Bowman, and the next of kin of the deceased Robert Bowman, concluded against the appellants, the testator's trustees, and certain beneficiaries, for a declarator that the shares of residue vested in the four children of the testator a morte testatoris. The First Division of the Court of Session, by interlocutor dated March 18, 1898 (1), affirming a judgment of the Lord Ordinary (Lord Stormonth-Darling) dated June 30, 1897, held that the shares vested a morte testatoris.

1898. Nov. 11, 14. *Haldane, Q.C.*, and *W. Campbell, Q.C.* (with them *W. J. Cullen*) (both the latter of the Scottish Bar), for the appellants. No right of residue vested in Isabella or Robert, and the vesting is still in suspense. The Court of Session were wrong in holding that once a child survived the testator the words "or to their respective heirs" did not become operative. If a gift be made after a life interest to a legatee, subject to a conditional limitation in the event of the legatee's death, the event is referable to the period of distribution, and the legacy does not vest indefeasibly in the legatee unless he survive that period. Here, at the date of the death of the two deceased children, they had no vested interest, and their death before the period to which the gift of the residue related brought into operation the alternative bequest, "or to their respective heirs."

[They commented on *Bell* v. *Cheape* (2); *Young* v. *Robertson* (3); *Bryson's Trustees* v. *Clark* (4); *Fyfe's Trustees* v.

(1) 25 R. 811.
(2) (1845) 7 D. 614.
(3) (1862) 4 Macq. 314.
(4) (1880) 8 R. 142.

Fyfe (1); *Adams' Trustees* v. *Carrick* (2); *Graham* v. *Hope* (3); *Lawsons* v. *Stewarts* (4); *Blair* v. *Blair* (5); *Nimmo* v. *Murray's Trustees* (6); *Haldane's Trustees* v. *Sharp's Trustees* (7); *Stodart's Trustees, &c.* (8); *Ross's Trustees, &c.* (9); *Elliot* v. *Bowhill.* (10)]

Asher, D.F., and *Ure, Q.C.* (with them *Danckwerts* and *J. D. Sym*) (all but the third of the Scottish Bar), for the respondents. Whether the vesting takes place at the winding-up of the estate or at the death of the testator is to be decided by looking at the will as a whole. The appellants cannot point to anything in the will as shewing an intention to postpone vesting except the word "or." But the word "or" in Scotland has never been given a fixed expression, and the word "and" may have been meant. On the other hand, the testator gave the fund to his four children by name, and gave a power to the trustees to make advances to the children (11) which was in favour of vesting.

[They cited *Maxwell* v. *Wylie* (12); *Cockrane* v. *Cockrane's Executors* (13); *Jackson* v. *M'Millan* (14); *Marchbanks* v. *Brockie* (15); *Fraser* v. *Croft* (16); *Hay's Trustees* v. *Hay.* (17)]

Haldane, Q.C., in reply, cited *Hood* v. *Murray.* (18)

The House took time for consideration.

1899. July 25. EARL OF HALSBURY L.C. My Lords, I am satisfied that the Court below has arrived at the true construction of this will. Looking at the whole will, I entertain no doubt that the exposition of it has been rightly arrived at, and the only reason I make any observation upon the subject

(1) (1890) 17 R. 450.
(2) (1896) 23 R. 828.
(3) (1807) Mor. Dict. voce Legacy, App. p. 5.
(4) (1827) 2 Will. & Sh. App. 625–36.
(5) (1849) 12 D. 97.
(6) (1864) 2 M. 1144.
(7) (1890) 17 R. 385.
(8) (1870) 8 M. 667.
(9) (1884) 12 R. 378.
(10) (1873) 11 M. 735.
(11) See Lord Shand's judgment, post, p. 533.
(12) (1837) 15 S. 1005.
(13) (1854) 17 D. 103.
(14) (1876) 3 R. 627.
(15) (1836) 14 S. 521, 524.
(16) (1898) 25 R. 496.
(17) (1890) 17 R. 961.
(18) (1889) 14 App. Cas. 124.

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is that I am not able to follow the reasoning which led the learned judges below to that conclusion. I find myself, in I believe more than one instance, dissenting from the reasons which they have given for their judgment.

My Lords, I have looked at this instrument as a whole. I have always protested, and still protest, against reading one man's will in the light of another man's will when they are in construction, in design, and in language often extremely different. I do not deny that what are called "canons of construction" are sometimes very useful for the purpose of making known the meaning which the law would attach to particular phrases and words, but I am very much disposed to say that canons of construction are, what has been popularly said of fire, very good servants but very bad masters. When I look at an instrument like this I feel bound to see what the real view and intention of the testator was. I believe that in this case the Courts below have come to the right conclusion as to what the testator did intend; but I arrive at that conclusion by looking at the instrument as a whole, seeing the circumstances with which the testator was dealing, and applying the words he has used in their natural meaning in the sentence in which they occur. Therefore, my Lords, I am prepared to affirm the judgment of the Courts below, although, I regret to say, not altogether for the reasons which have led the Courts to that conclusion.

LORD WATSON (read by Lord Davey). My Lords, I have come, not without hesitation, to the conclusion that the judgment appealed from may be affirmed, not for the special reasons assigned in the Court below, but on the grounds indicated by my noble and learned friend Lord Davey.

The testator, Lawrence Bowman, by his trust disposition and settlement directed his trustees, "on the dissolution and winding-up of the firm of Bowman & Co., in the event of the predecease of my wife, and if she then survives on her death," "to realize my whole means and estate, and to divide the same into four equal shares, and pay one share to each of my children, Archibald, Janet, Robert, and Isabella, or to their respective heirs."

I do not doubt, and to that extent I entirely agree with the learned judges of the Court of Session, that the word "or" which introduces the respective heirs of the four children named is equivalent to "whom failing," and is an expression which imports the conditional institution of the heirs of each child to take the fourth share to which their predecessor is instituted, in the event of the child dying before the point of time, whatever that may be, which was in the contemplation of the testator. I fail to see why a gift over in favour of the heirs of an instituted child should be otherwise construed or have any different effect than a gift over in favour of another relative or of a stranger nominatim. In every such case the question as to when the gift over becomes operative depends upon the same considerations. The point to be ascertained is at what period of time the testator must be held to have had it in view, or, in other words, must be held to have intended that the right of the institute should come to an end if he was not then alive, and that the right of the conditional institute should emerge. Of course the intention of the testator in that respect must be matter of fair and reasonable inference from the whole terms of his will.

In the present case the time fixed by the testator for the division of his trust estate into shares, and the distribution of these shares amongst the beneficiaries who are appointed to take, is "on the dissolution and winding-up of the said firm of Bowman & Co., in the event of the predecease of my wife, and if she then survives upon her death." Had that direction stood alone, and had it not been qualified by other provisions of the trust settlement, it appears to me that the direction, in so far as it bears upon the date at which either the children named, if then in life, or, in the alternative, their then surviving heirs, were to take, would have been more easy of construction. But the other provisions of the settlement disclose peculiar features. From these it plainly appears that the main purpose of the trust was for accumulation of the profits of the colliery business carried on by the firm of Bowman & Co. No life-rent right of the estate was thereby constituted. The trustees were merely directed to allow the testator's widow the life-rent enjoyment

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of his dwelling-house, and to make her such allowance as they might consider necessary for the maintenance of herself and of such of the testator's daughters or their children as might be living in family with her. Provision was made for payment to his daughter Isabella and his son Robert of the sum of 1000*l.* independently of any interest which they might take in the residue of the estate; and, during the subsistence of the firm, for payment to each of his sons Archibald and Robert of the sum of 2*l.* per fortnight. And provision was made during the same period for payment to his son Archibald of a yearly salary of 104*l.* payable quarterly, so long as he continued to perform his duty in attending to the interests of the trustees in connection with the firm of Bowman & Co.

That the accumulation of business profits, before the realization and distribution of the estate, was the main purpose which the testator had in view, is made apparent by the wide power which he conferred upon his trustees with respect to the conduct of the colliery business and the duration of the firm of Bowman & Co. In terms of the contract of copartnery under which the testator was carrying on that business at the time of his death in September, 1882, the partnership did not necessarily expire until the termination in the year 1892 of the coal leases, which it was formed in order to work. It was expressly covenanted that the firm should not be dissolved by the death of any partner, and that the representatives of a deceasing partner should have the option of retaining his share and interest in the business. By his trust settlement the testator empowered his trustees, as representing him in the firm of Bowman & Co., "to be parties to any new lease or leases which the said firm may consider it expedient to enter into"; and after providing that the trustees should not incur any personal responsibility from loss sustained by the firm in respect of such new leases, he directed that the profit or loss, as the case might be, should be added to or deducted from his trust estate. In point of fact, the trustees have already, with the other members of the firm, become parties to new leases of the collieries carried on by the company, which expire at December 31, 1904, Lammas, 1905, and Whitsunday, 1912, which meantime will probably

have the effect of postponing the period of distribution of the trust estate for no less than ten years.

If the time of the dissolution of the firm of Bowman & Co. had been even approximately known to the testator, or had been ascertainable by reference to the provisions of his trust settlement, instead of being left to the discretion of the trustees, I am inclined to think that the actual time of distribution would have been the period at which the testator intended that the beneficiaries to whom payment was to be made should be ascertained, only such of his children as were still alive then taking, and failing them their heirs. The general frame of the trust settlement favours that construction, because no right is constituted either in favour of the children named or their heirs, except the alternative right of the one or other of them to receive payment at that date.

The general canon of construction applicable to cases of this kind was discussed by the Lord Chancellor (Westbury), Lord Cranworth, and Lord Chelmsford in the Scottish appeal of *Young* v. *Robertson*. (1) The Court of Session had held, by a majority of ten judges against three, that the gift of residue vested a morte testatoris, and that the institutes who were then alive, but predeceased the period of distribution which was appointed to take place upon the death of the testator's widow, took in preference to the conditional institutes. The judgment was reversed by the House, who affirmed that the proper time for ascertaining the survivance of the institutes or conditional institutes, and their alternative right to take the shares provided to them, was the period appointed for distribution of the trust estate on the death of the life-rentrix, and not the decease of the testator.

Lord Westbury, in his opinion, which is entirely consistent with that of the noble and learned Lords who sat with him, refers to the "reasonable and established rules of construction" which are applicable to such a case, and these his Lordship states to be the same in the jurisprudence both of England and Scotland. One settled rule thus laid down by his Lordship is (2), "that words of survivorship occurring in a settlement

(1) 4 Macq. 314.

(2) 4 Macq. 314, 319.

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(that is, in a will) should be referred to the period appointed by that settlement for the payment or distribution of the subject-matter of the gift. That undoubtedly is the rule now finally established in this country, and it has been ascertained from the authorities which have been cited at the bar that the rule was established in Scotland even before it was finally recognised in this country."

Lord Westbury then proceeds to cite two instances in illustration of the natural and reasonable rule which he has thus stated. The first refers to the case where the testator gives a sum of money or the residue of his estate to be paid or distributed among a number of persons, and refers to the contingency of one or more of them dying, and then gives the estate or the money to the survivor "in that simple form of gift which is to take effect immediately on the death of the testator." In that case the words are construed to provide for the event of the death of any one of the legatees during the lifetime of the testator. His Lordship then goes on to say (1): "By a parity of reasoning, if a testator gives a life estate in a sum of money or in the residue of his estate, and at the expiration of that life estate directs the money to be paid, or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of those persons dying, without specifying the time, and directs in that event the payment or distribution to be made among the survivors, it is understood by the law that he means the contingency to extend over the whole period of time that must elapse before the payment or distribution takes place. The result, therefore, is that in such a gift the survivors are to be ascertained in like manner by a reference to the period of distribution—namely, the expiration of the life estate."

Lord Cranworth, after stating his concurrence in all the views expressed by the Lord Chancellor, went on to say: "I take it that the rule is well established upon the authorities as well as upon principle, both in Scotland and in England, that where there is a clause of survivorship, primâ facie survivorship means the time at which the property to be divided comes into

(1) 4 Macq. 314, 319, 320.

enjoyment—that is to say, if there be no previous life estate, at the death of the testator; if there be a previous life estate, then at the termination of that life estate."

It appears to me to be in vain to contend that the provision of the trust settlement which your Lordships have to construe in this appeal is, in substance, anything other than a clause of survivorship. The direction to the trustees is to divide the whole estate, and to pay the shares to each of certain children named, and, in the event of their previous failure, to their respective heirs, who are the conditional institutes. The testator has not expressly or, so far as I can see, by plain implication, specified the time at which the failure of the nominatim institutes is to be ascertained for the purposes of and with reference to that alternative gift, and the time must therefore be determined according to the reasonable construction which the law supplies. I cannot avoid the conclusion that the words to be construed in the present case, if they are not differentiated by the single exceptional feature which they present, are within the rule of legal construction laid down by the members of this House in *Young* v. *Robertson* (1); and that, if not so differentiated, they disclose the testator's intention to be that the failure of his children named was a contingency which might occur at any time before the arrival of the period appointed by him for the division and distribution of his trust estate.

The exceptional feature which I have referred to consists in the circumstance, already noticed, that the testator gave his trustees authority to enter into new mineral leases, which they have already done, and by that means necessarily to postpone the period appointed for division and distribution; so that the testator, who knew the terms of the leases under which his firm of Bowman & Co. carried on business at the time of his death, and therefore knew the period at which the dissolution of the firm would probably take place, if his trustees did not avail themselves of the power of prolongation, could not be aware of the period of the firm's dissolution, if that power were exercised by the trustees. And if that period were taken as the

(1) 4 Macq. 314.

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date of ascertaining survivorship, then the testator must be held to have delegated to his trustees the duty and right of determining by their action at what date the shares of his trust estate are to vest, and it may be of settling whether these shares are to be taken by his children as institutes, or by their heirs as conditionally instituted to them. To make the operative part of his settlement, the selection of the persons who were to succeed to the corpus of his estate dependent in a great measure upon the option of his trustees, was certainly an unusual if not a capricious provision; and that is one of the considerations which may fairly be taken into account in judging of the time at which the testator intended that survivorship should be ascertained. I have difficulty in holding that the provision was so capricious as to affect the application of the rule laid down in *Young* v. *Robertson* (1); but I do not entertain that opinion so strongly as to differ, if your Lordships were of opinion that it shewed the testator's intention to be that his children named were to take, if alive at the period of his decease, although they should not survive the period of division. I do not think that the judgment appealed from can be supported on any other ground.

LORD DAVEY (having stated the facts, particularly the renewal of the leases, as given above) continued:—

It has not been argued before your Lordships that this was in excess of the power contained in the testator's will. If so, the effect would seem to be to postpone the dissolution and winding-up of the firm until the year 1912; and, apparently, the trustees have power to further postpone it for an indefinite period. For it can hardly be doubted that the testator intended, if new leases were taken, as authorized by him, that the term of the partnership should be correspondingly enlarged, and his estate engaged for the purpose of working them.

This seems to me a material and admissible circumstance for consideration in construing the will. It is also material to observe that no life-rent (except in the house and furniture) is given to the widow or to the testator's daughters. They are

(1) 4 Macq. 314.

only entitled to an allowance at the discretion of the trustees. There is, therefore, an implied trust for accumulation, and (subject to the provisions of the Thellusson Act) the legatees will become entitled to the whole accumulation of income from the testator's death. It is obvious, therefore, that the postponement of the time of distribution is not merely for the purpose of making provision for the widow and daughters, but also and principally for the purpose of increasing the bulk of the property when it comes to be divided. Subject to the burdens which do not exhaust the annual income, his legatees, whoever they may be, are by the provisions of the will entitled to the whole estate, capital, and income from the testator's death though the period for distribution amongst them is postponed for the benefit of the estate.

It is agreed that the words "or his heirs," following a gift to a legatee, create a conditional institution in Scotland as well as England, and that the heirs take as conditional institutes. A long series of authorities was referred to by the Dean of Faculty on behalf of the respondents, in which a gift of that description, though preceded by a life-rent, was held to confer a vested interest a morte testatoris, so that if the legatee survived the testator he acquired a vested and indefeasible interest. But it was argued by the learned counsel for the appellants that those cases were prior to and overruled by the decisions in this House, which establish that if a gift be made after a life-rent to a legatee, subject to a conditional limitation in event of the legatee's death, the event is referable to the period of distribution, and the legacy does not vest indefeasibly in the legatee unless he survives that period. That, no doubt, is the general rule, and it has been recognised in *Bryson's Trustees* v. *Clark* (1) and *Fyfe's Trustees* v. *Fyfe* (2); but, like every other rule of construction, its application may be modified by the context of the will. In his judgment on the present case Lord M'Laren refers to a previous decision of the Court of Session in *Hay's Trustees* v. *Hay* (3), in which a testator provided a life-rent of his whole estate to his widow,

(1) 8 R. 142. (2) 17 R. 450.
(3) 17 R. 961.

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and directed his trustees, on the ceasing of the life-rent, to convey a certain specific heritable property to "A. B. and his heirs." It was held that the words "and his heirs" created a conditional institution in favour of the heirs in case of the death of A. B. But the Court held that the gift vested a morte, and that A. B. was entitled though he predeceased the life-rentrix. Lord M'Laren, in delivering his judgment in that case, expressed himself thus: "We must endeavour to find some definite criterion to be applied to such cases, and I think the true criterion is this—that where the legatees of the second order are either mentioned by name or by some description independent of the first, then they may be taken to be personæ delectæ, and their contingent interest is sufficient to suspend the vesting of the estate. But if the legatees of the second order are described as the children, or the issue, or the heirs of the institute (there being no ulterior destination), they are to be considered on this question as persons instituted in consequence of their being the natural successors of the institute, and, therefore, as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit which it was possible for the testator to give him consistently with the benefits previously given to the life-renters or other persons."

I find great difficulty in concurring in this reasoning of the learned judge, or in seeing why a different construction as regards the time of vesting should be given to a conditional limitation in favour of persons unnamed, but described as heirs, issue, or the like of the first legatee, and to one in favour of named persons, or persons described by some description independent of the first legatee, ex. gr., of the other legatees or of their children. I cannot therefore assent to the proposition laid down by Lord M'Laren as a general rule of construction or criterion to be applied in such cases. But I think the circumstance that the gift over is not in favour of some persona delecta by name may be taken into consideration together with other circumstances appearing on the will which affect the construction.

In the present case the words of the will no doubt create a

conditional institution, but I have arrived at the conclusion in the special circumstances of the case (though not without difficulty) that the shares of the testator's children vested a morte, and that the effect of the words in question was merely to prevent a lapse in event of the death of a legatee in the lifetime of the testator. As I have pointed out, the whole estate, income as well as capital (subject to the burdens), goes to the legatees from the death, and the time of payment only is postponed for the convenience of the estate. The testator has given his trustees a power which enables them to postpone indefinitely the winding-up and dissolution of the partnership, and consequent time of payment, and thereby indirectly, if the shares of the legatees do not vest a morte, to materially alter the rights of the parties entitled. It is extremely unlikely that the testator can have had any such capricious intention. Moreover, it is to be observed that the heirs to take would be the heirs ascertained at the time of the deceased legatee's death, who would take vested interests whether they survived the period of distribution or not: *Hood* v. *Murray*. (1) If therefore the period of payment were prolonged there would be a strong probability of the substitution of one dead person for another, which is a construction to be avoided.

For these reasons I think that the judgment of the Court of Session should be affirmed.

LORD SHAND. My Lords, like my noble and learned friend the Lord Chancellor, in coming to a decision as to the true construction of the testator's will in this case, I do not think it necessary to inquire into any question as to the effect of the important judgments in other cases to which my noble and learned friends Lord Watson and Lord Davey have referred—cases undeniably materially different in their circumstances and in the terms of the wills or settlements which were there under consideration.

I agree, my Lords, in thinking that the judgment of the Court of Session ought to be affirmed, although not on the grounds which have been adopted by the learned judges. I find

(1) 14 App. Cas. 124.

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enough in the special terms of the testator's will to lead me to the conclusion that the testator's estate vested in his children, as I am satisfied he intended that it should, on his death. I may add that, in coming to that conclusion, I do not feel that the decision is attended with the difficulties which my noble and learned friends Lord Watson and Lord Davey have expressed in the judgments they have now pronounced, and I believe the view which I take in this respect is also that of my noble and learned friend on the woolsack.

My Lords, the considerations which have led me to the conclusion that vesting took place under this will a morte testatoris are, in the first place, the great peculiarity we find in regard to the power given to his trustees, not only to receive the profits of the then existing co-partnership, which had a short period to run, but also to renew the leases of the co-partnership from time to time. That power was taken advantage of, and although the testator, who was said to be anticipating immediate death in 1878, died in that year, the result of the power he gave to his trustees is that his funds are locked up for a period extending until 1912. My Lords, I can find nothing in the testator's will which indicates that he had any intention thereby to benefit any particular favoured individual who might survive the period of a renewed partnership, or to benefit any line of succession, or to found a family which should acquire a large amount of money. That provision was calculated and intended to benefit simply, I take it, his children—to benefit his family; and the circumstance that he gave that power without any indication that he thereby intended to benefit any particular future successor indicates to me, or at least is a strong consideration with me, in holding that the vesting took place a morte testatoris. It is difficult to suppose that, having given his trustees power to lock up his funds for a period of time, he should have intended to deprive his children or any of them by a destination to their heirs of the power of using their shares of the estate as a present and useful fund of credit on and after his death.

In addition to that, I think, my Lords, it is worthy of notice that even in the will itself the testator seems to regard

these provisions as provisions in favour of his children, for I find that in the eighth purpose of the trust he expresses himself in this way: "I hereby specially empower my trustees to advance, during the currency of the trust, out of the principal of the shares of my estates effeiring to any child any portion thereof that my trustees may consider to be for their advantage," indicating that the testator himself regarded these bequests which he was making as bequests which became vested on his death in favour of his surviving children, as I have no doubt he did. He goes on to say, "and in like manner to the child or children of any deceased child."

In that view of the will, I have come to the conclusion that when the testator provides that this estate should be divided among his children "or heirs" he is simply providing for the case that a child might die before he died himself, in which event the heir would have taken his share; but, taking the will as a whole, I am clearly of opinion and without difficulty that this is a will under which vesting took place a morte testatoris.

Haldane, Q.C. Before his Lordship on the woolsack puts the question, I would venture to remind your Lordships that this action was brought under articles of agreement, the third purpose of which provided that the costs of the action should be paid out of the estate of the testator. Whether those words include the appeal to the House of Lords as part of the costs of the action might be a question for argument, but I am instructed that my learned friends will not offer any strenuous opposition to the costs in this House being dealt with in the same way.

Sym. We are directed not to oppose, but the trustees do not consent.

Haldane, Q.C. Besides representing the trustees, I represent two of the beneficiaries.

EARL OF HALSBURY L.C. The proper order to be made, as it appears to me, in the present aspect of things, would be that we should make that provision in the agreement apply

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to the costs in this House. The trustees of course must have their costs.

Ordered that the interlocutors appealed from be affirmed, and that the costs in this House be given as agreed with regard to the costs in the Court below.

Lords' Journals, July 25, 1899.

Agents for appellants: *A. & W. Beveridge, for Thomas White, S.S.C., Edinburgh, and William Shepherd, Solicitor, Leven.*

Agent for respondents: *John Kennedy, for Macpherson & Mackay, and Wilkie, Youden & Bruce, Solicitors, Leven.*

[PRIVY COUNCIL.]

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } PLAINTIFFS;

AND

PARKE AND ANOTHER. . . . . DEFENDANTS.

J. C.*
1899
March 7;
June 17.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of British Columbia—Construction—Permissive Statutory Powers—Injunction—Liability for Damages—Irrigation—Land Slides.

Wherever, according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and the authority given is in the strict sense of law permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

Metropolitan Asylums District v. *Hill*, (1881) 6 App. Cas. 193, approved.

Where the effect of British Columbian legislation was to authorize the respondents to irrigate their soil by the compulsory diversion of water from any adjacent stream, lake, or river, by conveying it over lands which do not belong to them, and to run the surplus water after irrigation through adjacent lands by means of flumes, ditches, or drains, all subject to provisions for compensation, and the respondents brought water upon their land in such manner as to be the substantial cause of damage to the appellants' line of railway by causing a slide of their land:—

Held, reversing the judgment of the Court below, that, in the absence of provisions shewing an intention on the part of the Legislature to take away the appellants' right to protect their property from invasion, they were entitled to an injunction to prevent the respondents' user of the water in disregard of their common law obligation to do no damage to the appellants' land.

APPEAL from a decree of the Supreme Court (Oct. 16, 1897) dismissing an appeal from a decree of Drake J. (Jan. 29, 1897).

The question determined in this appeal was whether the respondents, who had a statutory right to bring water upon their lands for agricultural purposes, were protected from liability for damage caused to the appellant railway so long as

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY.

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they exercised their statutory right in the manner permitted to them by the Legislature without negligence on their part.

The facts of the case and the proceedings in the action are stated in the judgment of their Lordships.

The statutory right in question was conferred by No. 144 of the Laws of British Columbia, June 1, 1870, consolidated 1871, ss. 30–36. There have been a series of amending and consolidating Acts since that date, the material passages of which are referred to by their Lordships.

The trial judge found that, apart from the statutory rights of the respondents, the appellants had made out a case for relief. But he came to the conclusion that the statute authorized the respondents to bring the water on to their land, although their action causing or permitting its escape should result in serious damage to the appellants, and thus took away the appellants' right to relief.

The Full Court affirmed this conclusion.

The judgment of McCreight J. concludes: "I agree with the learned trial judge that this is a case of damnum sine injuriâ, for it is admitted that the defendants have not acted negligently, and I think the case to which he refers of *National Telephone Co.* v. *Baker* (1) applies; and I will only add the remark made by Lord Blackburn in *Metropolitan Asylums District* v. *Hill* (2), that 'it is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals to shew that by express words or by necessary implication such an intention appears.'"

Blake, Q.C., for the appellants, contended that there was no law which took away from them the right to the enjoyment of their own property, or conferred upon the respondents the right to inflict serious damage upon it. Owing to existing conditions and conformation of soil, the effect of the respondents' irrigating their land in the manner complained of is to produce a slide many hundred feet wide, rendering unstable and moving many millions of tons of soil, and extending over sixty or seventy acres. The results are that the appel-

(1) [1893] 2 Ch. 186. (2) 6 App. Cas. 208.

lants' railway track, instead of being, as but for the respondents' action it would be, a permanent way, solid and stable, has been made and must continue a moving mass sliding towards the Thompson, a great and rapid river just below. Every year the track sinks and slides, declining towards the river, and has to be moved and set up again temporarily at a heavy and constantly recurring expenditure. Reference was made to the Consolidated Ordinance of 1871, ss. 30–36, and to 45 Vict. c. 6, s. 3, and it was contended that according to the true construction of those sections no right was conferred on the irrigator so to exercise the powers conferred thereby as to injure the property of his neighbour. The sections contemplated certain described persons obtaining a right to divert water on to their land for certain specified objects. They directed compensation to be given to those with whose property they meddled in effecting such diversion. There is nothing to shew that other persons damaged by the escape of water were excluded from compensation. Such damage might not usually occur, and it was unnecessary to provide in express terms for compensation. The ordinary common law right to compensation for damage voluntarily done by the respondents is not taken away, and the grant of special powers to the respondents should be construed to be conditional on their so exercising them as not to interfere with the rights of others. The whole spirit of the legislation on this subject was to grant powers subject to compensating third parties for any damage inflicted by their exercise.

Haldane, Q.C., and *J. D. Crawford*, for the respondents, contended that the earth slides which damaged the appellants' line of railway were not caused by any negligence on the part of the respondents. They did not contest the general principle laid down by the appellants, but submitted that in the special circumstances of the case the rule laid down in *Rylands* v. *Fletcher* (1) did not apply. The authority given by statute in this case was very definite and express, and the possible mischief which might arise from its reasonable and proper exercise must be held to have been within the contemplation of the

(1) (1868) L. R. 3 H. L. 330.

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Legislature. So long as the respondents used the statutory powers reasonably and without negligence, they are not responsible for the consequences. Reference was made to *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1), which it was contended laid down the principle applicable to this case, namely, that in the absence of negligence a man exercising a statutory right is not liable for injury done to another. The Legislature, having sanctioned the right, sanctions also the consequences which result from its exercise. [THE LORD CHANCELLOR. In that case it was not a question relating to a private owner; the zemindar had a public duty with limited rights.]

Counsel for appellants were not heard in reply.

1899 *June* 17.

The judgment of their Lordships was delivered by

LORD WATSON. The appellants are owners of the Dominion Railway, known as the Canadian Pacific Railway, which, in its course through the Yale district of British Columbia, passes near to the Thompson river at the distance of about half a mile from the lands belonging to the respondents, which lie to the eastward.

The respondents' ranch, which appears to be about 320 acres in extent, is situated—to use provincial phraseology—upon benches, or, in other words, upon a series of table lands, rising gradually to the eastward, above the level of the Thompson river. The land was originally acquired from the Crown, under a pre-emption title, by one William Rice Puckett, before the Province of Columbia had been admitted into the Union. Puckett, in the year 1872, transferred his interest to James Robinson; and, in July, 1884, Robinson transferred his interest to T. G. Kirkpatrick, who, in April, 1894, sold and transferred his interest in the same to the respondents, the transfer being duly recorded.

The British Columbian Land Ordinance of 1870, by s. 30, provided that "every person lawfully entitled to hold a pre-emption under this Ordinance, and lawfully occupying and bonâ fide cultivating, may divert any unrecorded and unappropriated water from the natural channel of any stream, lake, or

(1) (1874) L. R. 1 Ind. Ap. 364.

river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the commissioner of the district to that effect, and a record of the same shall be made with him, after due notice as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object therefor, and all such other particulars as the commissioner may require. For every such record the commissioner shall charge a fee of two dollars, and no person shall have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record shall have been made."

Sect. 33 of the Ordinance enacted that "the right of entry on or through the lands of others for any lawful purpose upon, over, or under the said land, may be claimed and taken by any person lawfully occupying and bonâ fide cultivating as aforesaid, and (previous to entry) upon paying or securing payment or compensation, as aforesaid, for the waste or damage so occasioned, to the person whose land may be wasted or damaged by such entry or carrying of water." Sect. 34 makes provision for the assessment of the amount of compensation payable, in case of dispute, either summarily or by a jury of five persons.

The 36th section of the Ordinance enacts that "All assignments, transfers, or conveyances of any pre-emption right heretofore or hereafter acquired shall be construed to have conveyed and transferred, and to convey and transfer, any and all recorded water privileges in any manner attached to or used in the working of the land pre-empted."

The provisions already referred to of the Ordinance of 1870 were in substance re-enacted by No. 144 of the Laws of British Columbia consolidated in 1871, which is entitled, "An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia." Sects. 39 to 50 of chapter 66 of the Consolidated Statutes of British Columbia, 1888, relate to the same subject. Sect. 41 provides that "the owner of any water privilege, or right acquired by record, shall have no exclusive right to the privilege so recorded until he shall have

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constructed a ditch for carrying the water to the place where it is intended to be used; and, in case any such ditch shall not be of sufficient capacity to carry the quantity of water recorded by the owner of such ditch, then the exclusive right of such owner shall be limited to the quantity which such ditch may be capable of carrying, notwithstanding such record, until such ditch shall be enlarged so as to be capable of carrying the quantity of water recorded by such person."

Sect. 47 of the Statute of 1888 empowers the proprietors or occupiers of any lands subject to irrigation, with the consent in writing of the commissioner, by means of flumes, ditches, or drains through the adjacent lands, to run their surplus and waste water into any creek, gulch, or channel. The power thus given is qualified by the condition that it shall be "subject to the provisions of the law for the time being in force respecting compensation for entry upon occupied lands for carrying water through or over them." Sect. 49 provides that all assignments, transfers, or conveyances of any pre-emption right, when the same are or were permitted by law, and all conveyances of land in fee, whether such assignments, transfers, or conveyances were or shall be made before or after the passing of the Act, shall be construed so as to carry any and all water privileges in any manner attached to or used in the working of the land pre-empted or conveyed. Sect. 56 enacts and declares that whereas, in times past, many records of water rights and privileges had been honestly but imperfectly made, in all cases where the validity of any water record, made before April 6, 1886, might be called in question, and the Court or judge before whom the case was pending should be of opinion that the record was made bonâ fide, the same should be held to be good and valid so far as the making and entry thereof is concerned, and effect should be given thereto according to the intent thereof.

In the valley of the Thompson river, and in other districts of British Columbia, irrigation is indispensably necessary in order to develop the fertility of the soil. Accordingly there have been a considerable number of provincial Acts passed from time to time in order to the sanction and regulation of

water privileges. Their Lordships have not thought it necessary to refer to these in detail, but have noticed all the statutory enactments to which their attention was directed in the argument upon this appeal.

Puckett, the original pre-emptor of the lands now belonging to the respondents, on November 21, 1868, acquired a record of 300 inches of water to be taken from McCallum's Creek, and, on April 10, 1871, he acquired a record of 300 inches of water to be taken from McCallum's and Pennie's Creek, for the purpose of irrigating the lands. The respondents, as his successors, have now right to the water privileges which were so acquired by him.

The Canadian Pacific Railway, as it passes the lands of the respondents, was constructed by the Dominion Government, and was thereafter transferred to the appellant company, and opened for traffic in the year 1886. The railway, and the whole undertaking now carried on under the name of the Canadian Pacific Railway, were, by patent of Her Majesty, under the Great Seal of Canada, dated May 25, 1896, granted to the appellant company. The grant was made under the proviso that "should our title to any portion or portions of the said tract of land hereby granted be found to be defective, neither the company, nor its successors or assigns, shall have any claim in respect thereof by virtue of anything contained in these presents." No question arises in this action as to any defect of the Crown title, the only question relating to the powers which the respondents are entitled to exercise by virtue of the water privileges attached to their lands.

The appellant company brought their writ on July 20, 1895, and an amended statement of claim was delivered on October 27, 1896, before the Supreme Court of British Columbia. The amended statement sets forth that the respondents brought large quantities of water upon their lands for the purposes of irrigation; that they did not carry off the surplus water by means of flumes, ditches, or drains, but allowed it to mingle with the subsoil, with the result of causing a slide of the land in the direction of the Thompson river, and thereby occasioning, from time to time, serious

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damage to the line of railway. The appellant company claimed: "that the defendants, their servants, agents, and workmen, be restrained, by the order of this Honourable Court, from continuing to bring water upon their lands, and to allow such water to escape to the plaintiffs' line of railway, and to cause land slides thereon as mentioned."

The case went to trial, at Vancouver, before Drake J. and a special jury. The learned judge submitted these two questions to the jury: "(1.) Is the water brought by the defendants upon their land for the purpose of irrigation the sole cause of the damage done to the plaintiffs' line of railway by the slide in question? (2.) Is the water brought by the defendants on their land for the purpose of irrigation the substantial cause of the damage done to the plaintiffs' line of railway by the slide in question?" The jury answered the first question in the negative, and the second in the affirmative.

The learned judge who presided at the trial, having considered the verdict returned by the jury, refused the injunction craved, and dismissed the appellants' action with costs. On appeal, the Full Court of British Columbia, consisting of McCreight, Walkem, and McColl JJ., affirmed, with costs, the judgment of Drake J.

The learned judges of the Supreme Court fully recognised the gravity of the legal issues which were raised, and their importance to the parties. Drake J. said: "The jury found, after a trial extending over many days, that the substantial cause of the injury done to the plaintiffs' railway was the water brought on to the lands of the defendants for irrigation purposes, and on that finding the plaintiffs move for judgment, asking that the defendants be restrained from further damaging the plaintiffs' line by irrigating the lands in question. The effect of such an order will be to prevent the defendants carrying on farming operations upon the lands in question."

Drake J. at the same time clearly explained the origin and nature of the slide or landslip which, during periods of irrigation, encroached upon and damaged the appellants' line of railway: "The defendants irrigated about 34 acres of land on the high bench above the railway with water brought by a

ditch capable of carrying 160 inches of water. An inch of water means 12,960 gallons in 24 hours, or 1728 cubic feet. The soil which the defendants irrigated was proved to be of a very porous quality, consisting of many feet of gravel underlying a slight deposit of sandy loam, and below the gravel was a very large bed of what is called silt, a mineral that absorbs water rapidly, and when its saturation reaches 78 degrees it is converted into liquid mud. At a point on the banks of the Thompson, above and below the plaintiffs' line, a large slide has been formed by water percolating through the soil and causing the earth to slip. This slide is continually moving towards the river, forcing the rails out of position, and frequently large masses of more or less liquid silt carrying away the road bed drop from under the line. The slide is now about 66 acres in extent and continually increasing."

The damage done to the railway of the appellant company by the slide, and the constant repair and renewal which it necessitates, may be gathered from the uncontradicted evidence of Henry John Gambie, the chief engineer since its opening in 1886 of the Pacific division of the Canadian Pacific Railway. Speaking of that portion of the railway which is affected by the slide in question, he says: "We keep a resident watchman there living on the spot, and no train is allowed to pass over without his signal giving permission. In addition, we have been obliged to divide up the section, and put an extra section gang in order to have three or four men at all times. Besides that we must keep over a great part of the reach, we must keep 25 or 30 men working along for weeks together on this particular piece. They are not able to do it alone. We must put on working trains to bring material, in order to keep up the railway embankment. Notwithstanding all that, there is a very great danger to the trains passing over it."

In coming to the conclusion that the application of the appellant company ought to be dismissed, Drake and McCreight JJ., with whom Walkem J. agreed, proceeded solely upon the ground that the British Columbian legislation which has been already referred to gives to the holder of land under a preemption title, who has taken a supply of water for irrigation

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purposes and has recorded his privilege in accordance with its provisions, an absolute right to use for irrigation the water so taken by him, no matter how injurious the use may be to neighbouring landowners, and that he was under no liability to compensate them for the injury done, unless it were shewn that his use was negligent. In other words, they held that his irrigating the surface of his land, by bringing to and pouring upon it foreign water, which immediately percolated to the substratum of silt, with which it mingled, and then escaped from his land as liquid mud, and seriously damaged the adjoining land, was the necessary consequence of his exercising his statutory right, and did not constitute negligence, or afford the owner of the adjoining land any cause of action. McColl J., without expressing the same conclusion, proceeds to consider whether the appellant company would have been entitled to an injunction if they had offered to make compensation to the respondents in ceasing to irrigate so as to cause a land slide, and the consequent destruction of the railway line. The learned judge, however, does not go so far as to solve the question, seeing it had not been argued, and his brethren had been able to come to the conclusion that the judgment should be affirmed. It may be added that the record in this appeal contains no materials for raising the question which was discussed by the learned judge.

Their Lordships think that the judges of the Supreme Court were right in considering the crucial question in this case to be whether the Columbian legislation which they had to construe was, as between the person using the powers hereby conferred and the owners of adjacent lands, imperative, or merely permissive. They examined the leading authorities bearing upon the point, and their conclusion, as expressed by Drake J., was: "The difference in the present case is that there is no direction that irrigation waters should be used, but only a permission to use them; *but the permission to use implies a legal right of use which will bar an action for damages when the use has been non-negligent.*" The proposition is somewhat too broadly stated. Wherever, according to the sound construction of a statue, the Legislature has autho-

rized a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

The leading authorities in the law of England upon this question, which though not numerous are of considerable weight, are *Managers of Metropolitan Asylums District* v. *Hill* (1) and *London, Brighton and South Coast Ry. Co.* v. *Truman.* (2) In the first of these cases, the managers were authorized by a public statute 30 & 31 Vict. c. 6, no locality being specified, to erect hospitals for the reception of the sick poor of the metropolis. In virtue of these statutory powers, they commenced the erection of a small-pox hospital at Hampstead, when an injunction was applied for by the respondents, who were the proprietors of houses in the vicinity. At the trial, it was found by a jury that the hospital was, or would be, to the nuisance of the respondents. The House of Lords decided in favour of the respondents upon the express ground that the statute was permissive, and gave the managers no authority to erect an hospital which was injurious to neighbouring proprietors. The Lord Chancellor (Selborne) said (3): "I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent."

In the same case Lord Blackburn said (4): "It is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private right of individuals to shew that by express words, or by necessary implication, such an intention appears." The noble and learned Lord also observed (5): "the Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and, if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was,

(1) 6 App. Cas. 193.
(2) (1885) 11 App. Cas. 45.
(3) 6 App. Cas. 202.
(4) 6 App. Cas. 208.
(5) 6 App. Cas. 203.

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not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others."

In the second case, a railway company were empowered, by a local and personal Act, passed after due inquiry, to purchase additional lands not exceeding fifty acres for the purposes, inter alia, of receiving, depositing, or keeping any cattle, or any goods conveyed or intended to be conveyed on the railway. They were required by the Act to sell superfluous lands within ten years from its passing. Under that power they purchased between two and three acres of ground adjacent to one of their stations. For nearly ten years the ground was used as a market-garden, when the company devoted the land to the purposes of their cattle traffic, and constructed a yard or dock for the cattle carried by them. Certain occupiers of houses in the neighbourhood of the yard, who complained of it as constituting a nuisance, but did not allege negligence on the part of the company in using it, applied for an injunction, which was granted by North J., and his decision was affirmed by the Court of Appeal. Their decisions were reversed by the House of Lords, who held that the provisions of the Act which related to the acquisition and use of the yard were intended by the Legislature to be imperative in the same sense as its provisions relating to the use of the railway, and that, no negligence having been shewn on the part of the company, the injunction ought to be refused.

In the present case the legislation of British Columbia is perfectly general, and applies to all lands within the province which had been, or at any future time might be, acquired by a subject under a pre-emption title from the Crown. It provides that the proprietor of land held under that title, with consent of the commissioner, and upon making payment of compensation, may compulsorily divert water from any stream, lake, or river adjacent, and may convey it to his own land for the purpose of irrigation; and he has also the right, if lawfully occupying and cultivating his own land, to convey the water through or over land which does not belong to him, upon paying due compensation for waste or damage. Then the

statute of 1882 empowers him, after the water has been used for irrigation, to run the surplus or waste water through the adjacent lands by means of flumes, ditches, or drains, subject to the same provisions as to compensation.

The legislation in question, in so far as its provisions relate to the use of the water by the irrigator after it has been conveyed to his own land, is undoubtedly conceived in language which is permissive. He is allowed to use it for the ordinary purposes of irrigation, which primâ facie imply that the water is to be distributed over and absorbed by the soil; and it is a circumstance not to be overlooked in construing these statutory provisions that the Legislature has contemplated and has provided compulsory means of carrying off surplus water, which has not been absorbed by the soil, by flumes, ditches, or drains through the adjacent lands of other owners. The real question, therefore, in this case comes to be, whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility. The respondents contended for the second of these alternatives, which has been adopted by the Courts below; but, in order to justify their contention, it is incumbent upon them to shew that the Legislature deliberately intended to take away the rights of individuals to protect their property against invasion. The respondents maintain that, so long as they are not negligent, the Legislature has given them the absolute privilege, for the consequences of which they are not responsible, of causing, by means of their irrigation, a landslip which will have the ultimate effect of carrying the lands situated at a lower level than their own, together with all the erections upon them, whether consisting of houses or railways, into the Thompson river.

Their Lordships have been unable to discover, in the

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statutory provisions submitted to them, any sufficient ground for holding that the privilege of irrigating his own soil with foreign water was meant by the Legislature to be imperative, and was intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case where such injury was occasioned by the negligence of the irrigator. It is evident that no such circumstances occur in this case as led to the decision of the House of Lords in *London, Brighton, and South Coast Ry. Co.* v. *Truman.* (1) The company could not, under the power conferred upon them, acquire and use additional land for the enlargement of one of their stations without incurring a statutory obligation to the public to use that additional land as part of their railway, so long as their line was open for the accommodation and conveyance of traffic. The land added was, in these circumstances, just part of the railway, and within the principle of *Hammersmith and City Ry. Co.* v. *Brand.* (2) In the present case the irrigator is at liberty, subject only to the consent of a commissioner, who is not charged with the duty of seeing that no injury results to lands adjacent to those which are to be irrigated, to determine the quantity of water he desires to appropriate, the means by which it is to be conveyed to his land, and the means by which surplus or waste water is to be discharged. When the water has been conveyed to his land he is authorized to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation the whole, or part, or none of it. These provisions are certainly consistent with the view that no part of it was meant to be employed to the injury of neighbouring lands.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from; to grant an injunction restraining the respondents, their servants, agents, and workmen, from so irrigating the respondents' lands as to cause a land slide or slip, and thereby to injure the appellant company's line of railway; and to order that the respondents do pay to the appellant company their costs of action in both Courts below.

(1) 11 App. Cas. 45. (2) (1868) L. R. 4 H. L. 171.

The respondents must pay to the appellant company their costs of this appeal.

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Solicitor for appellants: *S. V. Blake.*
Solicitors for respondents: *Hubbard & Wheeler.*

[PRIVY COUNCIL.]

McLEOD . . . . . APPELLANT.

AND

ST. AUBYN . . . . . RESPONDENT.

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May 17, 18; *July* 22.

ON APPEAL FROM THE SUPREME COURT OF ST. VINCENT.

Contempt of Court—Innocent Loan of Paper containing Scandalous Matter respecting a Court—Committing Judge ordered to pay Costs.

Contempt of Court may be committed by publication of scandalous matter respecting the Court after adjudication as well as pending a case before it. In England committals for such contempts have become obsolete: in small colonies consisting principally of coloured populations they may still be necessary in proper cases:—

But *held*, that where the appellant was neither printer nor publisher nor writer of such scandalous matter, but had innocently lent the paper containing it to a friend without knowledge of its contents, he was neither constructively nor necessarily guilty of contempt of Court, and that the judge who committed him must pay the costs of appeal to Her Majesty in Council.

APPEAL from an order of the respondent as Acting Chief Justice of the Supreme Court (May 3, 1897) committing the appellant to Kingstown prison for fourteen days for an alleged contempt of Court by negligently publishing, on April 2, 1897, a copy of a newspaper called the *Federalist*, dated March 31, 1897, wherein were a letter headed a "Judicial Scandal" and signed "Fairplay," and an article headed "The Administration of Justice."

The facts and proceedings in the case, the article, and the letter are set out in the judgment of their Lordships.

The respondent filed in answer to the appeal certain observations addressed to their Lordships in which he gave his

* *Present:* LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and LORD DAVEY.

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own version of the proceedings, and concluded, "that if in a small Colony like this such a scandal had been allowed to pass unheeded, the damage done to the administration of justice would have been incalculable."

Blake Odgers, Q.C., and *Shipman*, for the appellant, contended that the respondent's judgment and order were founded upon insufficient reasons, and that the appellant never committed any contempt of Court. His delivery of a copy of the *Federalist* to the librarian in question could not possibly constitute the offence charged, or any other offence known to the criminal law. When the letter and article relied upon are read and fairly considered, it is found that they do not contain anything which either involves criticism on a pending case, or which could interfere with or obstruct the administration of justice. They did not, therefore, constitute any contempt of the Court. Besides, they were not and did not even purport to be written or published by the appellant, and they were neither written nor published with his knowledge. The different kinds of contempt are specified by Lord Hardwicke in *In re Read and Huggonson*. (1) Where the contempt alleged is in the nature of a criminal offence, scienter must be shewn: see *Emmens* v. *Pottle* (2); *Metropolitan Music Hall Co.* v. *Lake* (3); see also *Ex parte Turner* (4); *Dallas* v. *Ledger* (5), where the contempt was of a very trifling nature; *Helmore* v. *Smith* (6); *Moseley's Case*. (7)

Alderson Foote, Q.C., and *Groser*, for the respondent, contended that the statements and matters contained in the letter and article were scandalous and defamatory, were an attack upon the integrity of the Court, and were calculated to obstruct and interfere with the administration of justice in the island of St. Vincent, and to bring the same into contempt. The publication thereof by the appellant was established by the delivery of the paper to the librarian, for delivery entailed responsibility, whether or not there was either negligence or

(1) (1742) 2 Atk. 291, 469.
(2) (1885) 16 Q. B. D. 354.
(3) (1889) 58 L. J. (Ch.) 513.
(4) (1844) 3 M. D. & D. 523.
(5) (1888) 52 J. P. 328; S. C. 4 Times L. R. 432.
(6) (1886) 35 Ch. D. 449.
(7) [1893] A. C. 138.

mistake. The essence of contempt lies in the effect produced, not in the intention with which a particular act is done. The effect here was to circulate a scandal on the Court. If done innocently or inadvertently it was nevertheless a contempt, which the appellant has refused to purge by a sufficient apology. See *Rex* v. *Lord George Gordon* (1), cited in Odgers on Libel, p. 453; *Crawford's Case.* (2) See also *In re R. Thompson* (3); *Rex* v. *Almon* (4); *American Exchange Co.* v. *Gilling* (5); *Rex* v. *Clement* (6); *Rex* v. *Jeff* (7), cited in Odgers; *Ex parte Jones* (8); *O'Shea* v. *O'Shea and Parnell* (9); *Ex parte Green* (10); *Jones* v. *Flower* (11); *McDermott's Case* (12); *Rainy* v. *Justices of Sierra Leone* (13); *Pollard's Case* (14); *Wallace's Case.* (15)

Odgers, Q.C., replied.

The judgment of their Lordships was delivered by

Lord Morris. This case arises on appeal from the judgment and order dated May 3, 1897, made by the Acting Chief Justice of the Supreme Court of Judicature of the island of St. Vincent, the appellant being Charles John McLeod, and the respondent Geoffrey Peter St. Aubyn, the Acting Chief Justice of St. Vincent.

At the time of the happening of the events which led up to the order appealed from, the appellant was a barrister-at-law practising in the Supreme Court of St. Vincent, of which the respondent was the Acting Chief Justice. At the time there was a weekly newspaper called the *Federalist*, printed and published in the island of Grenada; the appellant was the agent and correspondent of the said newspaper for St. Vincent, and sent letters and articles to the said newspaper from St. Vincent

(1) (1787) 22 How. St. Tr. 176.
(2) (1849) 13 Q. B. 613.
(3) (1680) 8 How. St. Tr. 50, appendix to judgment.
(4) (1765) Wilmott's Opinions, 243, 254.
(5) (1889) 58 L. J. (Ch.) 706.
(6) (1821) 4 B. & A. 218.
(7) (1630) 15 Vin. Abr. 85.
(8) (1806) 13 Ves. 237.
(9) (1890) 15 P. D. 59.
(10) (1891) 7 Times L. R. 411.
(11) (1894) 11 Times L. R. 122.
(12) (1866) L. R. 1 P. C. 260; S. C. (1868) L. R. 2 P. C. 341.
(13) (1852) 8 Moo. P. C. 47.
(14) (1868) L. R. 2 P. C. 106.
(15) (1866) L. R. 1 P. C. 283.

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which were always printed in a special column headed "St. Vincent." The *Federalist* newspapers were sent by post to subscribers at St. Vincent. The Public Library of St. Vincent was a subscriber, and ordinarily received its copy of said newspaper by post. The librarian was Benjamin Stephen Wilson. The *Federalist* of March 31, 1897, contained a leading article entitled "The Administration of Justice" as follows:—

"The Administration of Justice.

"At the present time, more than any other, it seems to be absolutely necessary, that the administration of justice in the several West Indian Colonies should inspire the confidence of every class of the population (1) with the stagnation in trade, the absence of ready money, the want and misery which prevails, the suffering inhabitants of these islands may grow reckless and desperate if on the bench they failed to find that impartial protection which a British judiciary implies. Happily for us in Grenada, the honesty, independence and impartiality of the bench is beyond the faintest shadow of suspicion. If the people in Grenada did not possess confidence in the superior courts there had been a serious state of affairs especially after the sweeping sales of the properties of the peasants for overdue taxes. This confidence and faith in the Supreme Court of the island is well founded, for no judge here has ever, within living memory, forgotten for a moment the sacred nature of the office which he fills nor the importance of the decisions which he may pronounce.

"All the other islands do not appear to be as fortunate as Grenada. St. Vincent especially has suffered more, perhaps, than any other from maladministration of justice. In Mr. Trafford the public had no confidence, and his locum tenens, Mr. St. Aubyn, is reducing the judicial character to the level of a clown. Law and order will only be observed when the tribunals of justice is (sic) pure and impartial.

"It does not seem from the letter of 'Fairplay,' which appears in another column, that the Acting Chief Justice of St. Vincent is capable of maintaining the noble traditions of the

(1) Punctuation *sic* in the record and presumably in the original.

British bench. He has apparently been too wrapped up and intermingled with personal disputes and squabbles of a questionable character to allow him to deal honestly and impartially with questions which come before him to be judicially settled. To nod and wink to counsel engaged in cases is not at all dignified in a judge; it becomes doubly criminal when he who performs these grievances and gymnastics is solemnly adjudicating questions of the utmost importance, involving the liberty, almost the life, of British subjects.

"Mr. Chamberlain having severely rebuked and censured Mr. St. Aubyn for gross partiality as a magistrate we fail to see how he could have been appointed as Acting Chief Justice of St. Vincent. If as police magistrate, with limited jurisdiction, Mr. St. Aubyn displayed in the administration of justice his violent partizanship, would he not as a chief justice, with absolute jurisdiction, give reins to his passions, and prostitute one of the most sacred secular positions merely to gratify his venom and his spleen? He has, it appears, done so, and thereby created a feeling of disquiet and unrest. If the people can have no faith in the findings of the Chief Justice, they may, doubtless, be tempted to redress their own wrongs, either of a private or public nature, with this result, that he who may be the chief cause of illegality will escape scathless whilst those he has provoked to an outbreak will become the victims of martial chastisement.

"St. Vincent has suffered much from the maladministration of justice.

"Discontent which might have culminated in riot has only been prevented by the influence and exertion of the St. Vincent editor of this journal, we hope he may be able to assist in allaying the dissatisfaction which prevails, consequent on the misconduct of the Acting Chief Justice. This ought not to be a difficult matter, especially as a strong desire is expressed that his Honour W. S. Commissiong, Q.C., Acting Chief Justice of Grenada should be appointed successor to Mr. Trafford. A week or two ago, all classes of the community, without regard to public and political differences, presented an address to the Acting Chief Justice of Grenada, indicative of the respect and

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esteem in which he is held, especially from his impartial, honest, and upright demeanour as a judge with such a man presiding over the Supreme Court of St. Vincent we are perfectly satisfied that complaints respecting the administration of justice would be no longer heard. Mr. Commissiong's experience as a practising barrister extends over a term of twenty-five years. Sir Walter Sendall, acknowledging Mr. Commissiong's ability at one time offered him the appointment of Chief Justice of St. Vincent, then vacant, ill-health prevented him accepting it at the time; but we have no doubt, that his Honour will not refuse to go to St. Vincent if the position of Chief Justice of that island were offered him. It would be well if a petition to this end were formulated for signatures in St. Vincent and then forwarded to the Colonial Office. There is no doubt but that the administration of justice in St. Vincent is rotten and corrupt, and that except some one be appointed to the bench who will inspire confidence and respect, the already oppressed peasantry may be goaded into madness. Mr. Commissiong, having as a judge won the confidence, the respect, and the esteem, of even his most violent political opponents, and having served the Government for a long number of years is entitled as well by his service as his ability to be successor to Mr. Justice Trafford, and we hope our fellow citizens in St. Vincent in their own interest, in the cause of the pure and impartial administration of justice in this island, will successfully press his claim upon the Colonial Offices."

It also contained a letter dated from St. Vincent of the date of March 15, 1897, as follows :—

"No. 4.

"A Judicial Scandal.

"To the Editor of *The Federalist*.

"Sir,—Kindly grant me space in your unfettered and fearless journal to expose the scandalous state of things that has existed here since Mr. Geoffrey Peter St. Aubyn's appointment as Acting Chief Justice in November last.

"The public career of this gentleman is interesting. A briefless barrister, unendowed with much brain who religiously

attended with his empty bag at the several Courts of London in the forlorn hope of picking up a case he, after long weary years of waiting exchanged the law for the stage (being a good amateur actor) and tried to earn an honest penny by turning his undoubted histrionic talent into account. In the meantime he had become an assiduous hanger-on at the Colonial Office and applied for every vacancy real or imaginary that he heard of, and it was whilst he was 'starring' in the provinces that, in an evil moment for St. Vincent, he was appointed police magistrate of the Kingstown District in May, 1891, at a salary of 450*l.* a year. His demeanour in the Magistrate's Court has been anything but dignified, and he has indulged in offensive expressions to the litigants before him which were discreditable to one in his position.

"A man of the Torquimada (1) type, narrow, bigoted, vain, vindictive, and unscrupulous, he takes advantage of his position to vent his spleen upon those whom he hates, though, unlike Torquimada, fortunately, he is unable to send them to the stake.

"He distinguished himself by openly advocating that all games of chance be played at the club, when, as police magistrate, it was his duty to punish those playing games of chance. But in the case of Mr. Sheffield late headmaster of the grammar school, the biter got bit rather severely and his spite and vindictiveness nearly landed him into serious trouble. Mr. Sheffield when his school was prosperous and he was in easy circumstances was drawn into the Kingstown Club, that haunt of dissipation and gambling; the poor man was ruined, and had to leave the club as a defaulter, whereupon a dead set was made by a clique headed by Mr. St. Aubyn upon the unfortunate man and every effort was made to smash him.

"Two women had a case before Mr. St. Aubyn as police magistrate upon one of them, who had tried to blackmail Mr. Sheffield, mentioned his name, Mr. St. Aubyn pressed the woman to make scandalous accusations against Mr. Sheffield. Mr. Branch, another of the clique wrote an anonymous letter in the *Sentry* on the matter, and after some time the administrator,

(1) *Sic*, and see note at p. 552 above.

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egged on by the clique, ordered the Grammar School Board to institute an inquiry. At the meeting the principal witness against Mr. Sheffield was Mr. St. Aubyn who in the most venomous manner repeated the accusations which he had extracted from the woman in his Court. Upon these facts being laid before the Secretary of State, Mr. Chamberlain took a very unfavourable view of Mr. St. Aubyn's conduct, severely censured him, told him that his conduct had been most unEnglish, and plainly hinted that his promotion would be stopped.

"Mr. St. Aubyn returned in November last lying under the cloud, but Mr. Thompson, who himself had taken a strong stand against Mr. Sheffield, appointed him to act as Chief Justice during the continued absence of Mr. Trafford. Mr. St. Aubyn soon shewed that he was utterly unfitted for such a post. He hob-nobs with two or three of the barristers, winks significantly at them in court, and in the trial of cases he has cast to the winds the ordinary principles of justice and fair play which require a judge to keep even the scales of justice between parties.

"At the sessions in November in the case against James Jack for larceny, the prisoner was undefended, and he called as a witness a woman named Emily Sirus. The Acting Attorney-General in a few questions completely disposed of the witness by shewing that she was a bad character and had been to prison many times. But Mr. St. Aubyn, to the disgust of everyone present, for a full quarter of an hour closely cross-examined the witness, sneered at her, asked her such questions: 'Why do you remember such a day; is it because you had gone to jail that day?' &c., and brought all the weight of his position against the undefended prisoner in the dock.

"At the recent sessions Mr. St. Aubyn's action on the bench was most extraordinary, more befitting a prosecuting counsel bent upon securing a conviction than a judge. In the case against James Dacon for carnal knowledge of a girl under 13 years, the prisoner, having given evidence on his own behalf, was subjected to a long and able cross-examination by the Acting Attorney-General, but Mr. St. Aubyn, satisfied, tried his persuasive powers, and closely questioned the unfortunate man, putting

him surprise questions clearly with a view to forcing a confession out of him, but Dacon having remained firm in his innocence, Mr. St. Aubyn threw his head back looking quite annoyed, and in his summing-up he said that Dacon was either very cunning or an idiot, as nothing could be made out of him in cross-examination. He charged the jury strongly against the prisoner, though after the evidence of Dr. Pereira for the prosecution and the evidence for the defence, it was clear that the prisoner must get off. The jury, in the teeth of the summing-up, acquitted the prisoner. Mr. St. Aubyn could not conceal his vexation at this result.

"The next day, when the case against Jack James for feloniously wounding was on, Mr. St. Aubyn exhibited feelings quite unprecedented in a British court of justice. His manner was most theatrical. He energetically fanned himself, fumed and fretted—hardly took a note of the evidence for the defence, told the Attorney-General it was a waste of time to cross-examine the prisoner's witnesses, interrupted Mr. McLeod, prisoner's counsel, without rhyme or reason, and in his summing-up told the jury that the defence was an insult to their intelligence, that they must bring in a verdict of guilty and recommend the prisoner to mercy. He added: 'Gentlemen, make up your minds in the box.' But the jury, the sole and exclusive judges of the evidence, resented this dictation, and retired, and, after mature deliberation, returned a verdict of 'Not guilty.' Mr. St. Aubyn's face was a picture. No judge has ever received such a humiliating snub. Jurymen who were present said that they had never seen such conduct on the part of a judge.

"Simply because Mr. McLeod was solicitor for Mr. Sheffield, Mr. St. Aubyn has shewn the greatest antipathy to that gentleman. He goes out of his way to be most offensive and discourteous to Mr. McLeod, and regrettable passages at arms have taken place between the two.

"It is the general opinion that Mr. St. Aubyn has proved himself incapable of filling the important position of judge, requiring calmness and dignity and evenness of conduct towards all, and the hope is expressed that if, as is anticipated,

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Mr. Trafford does not return, Mr. Commissiong will be appointed judge of this Colony.

"Yours faithfully,
"Fairplay."

"St. Vincent, 15th March, 1897."

On Friday evening, April 2, 1897, the appellant received by mail from Grenada some copies of the *Federalist* of March 31, and on the same evening the appellant went, as was his habit, to the Library. On arriving there he met a friend, Mr. T. R. Nairn, who in conversation mentioned that the *Federalist* newspaper had not arrived. The librarian, Mr. Wilson, stated that he had not received it as the post was late, but that he could have it in the morning. The appellant then stated that he had received his copies, and offered one to the librarian, Mr. Wilson, and handed it to him to be returned the following morning. On April 17 the appellant appeared as counsel in a case called on before the respondent, who thereupon directed the registrar to postpone cases in which the appellant was engaged as counsel until April 24. On that day the respondent made an order calling upon the appellant to attend in court on May 3, 1897, to shew cause why he should not be committed for contempt of Court in publishing the said copy of the *Federalist* by the handing of it to the librarian on the evening of April 2, 1897. On May 1 the appellant made and filed an affidavit as cause against the said order nisi, and on May 3 the appellant appeared in court. In his said affidavit the appellant swore that on the said April 2 the steamer arrived much later than usual from Grenada, and that he received a few copies of the *Federalist* near to 8 o'clock P.M., that he proceeded to the Library to get some papers before it closed—the hour of closing being 8 o'clock P.M. The appellant stated in his said affidavit the circumstances under which he lent the copy of the *Federalist* to Mr. Wilson, and was corroborated in that respect by Mr. Nairn. He further swore that he did not go to the Library to deliver the said copy, that he had not read the newspaper, and had not the slightest idea that it contained the article headed "The Administration of Justice," or the letter signed "Fairplay." On May 3, 1897, the appellant appeared by counsel before

the respondent. His counsel stated that neither the letter nor the article in the *Federalist* of March 31 was written by the appellant. The respondent, after hearing the arguments of appellant's counsel, made the order appealed from, which is as follows:—

"Whereas, by an order dated the 24th day of April, 1897, stating that on the letter headed 'A Judicial Scandal,' dated the 15th day of March, 1897, and signed 'Fairplay,' and the article headed 'The Administration of Justice,' dated the 31st day of March, 1897 (both appearing in a certain copy of an issue of a certain newspaper called *The Federalist*, dated the 31st day of March, 1897, annexed and exhibited respectively to the affidavits of Benjamin Stephens Wilson and Herbert Horatio Holder respectively) being read, and the said affidavits proving the said copy of the said issue of the said newspaper to have been published and otherwise dealt with as therein mentioned by Charles John McLeod, Esquire, barrister-at-law and solicitor of the said Court, being respectively read, and upon the Court taking the matter thereof into consideration, and deeming the conduct of the said Charles John McLeod therein mentioned and the said publishing of the said copy of the said issue of the said newspaper by the said Charles John McLeod a contempt of this Court. It was ordered that Charles John McLeod of Lot 103 in Kingstown, Esquire, barrister-at-law, and solicitor of the said Court, having personal notice thereof, should attend this Court on Monday, the 3rd day of May, 1897, at the hour of eleven o'clock in the forenoon, and should then shew cause why he should not be committed for contempt of this honourable Court in publishing the said copy of the said issue of the said newspaper called *The Federalist* (wherein were the said letter and article) on the 2nd day of April, 1897, and for his said conduct, and the said Charles John McLeod attending this Court this day pursuant to the said order and the affidavits and exhibit filed in this matter this day being read, and upon hearing Mr. Arthur Wellesley Lewis and Mr. James Eldon McCombie Salmon of counsel for the said Charles John McLeod, and the Honourable the Acting Attorney-General and Mr. Conrad Johnson Simmons of counsel, and this Court being of opinion that the said Charles John McLeod has (being

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agent in Saint Vincent for the said newspaper) by negligently publishing the said copy of the said issue of the said newspaper called *The Federalist* (wherein were the said letter and article containing matter scandalising the said Court) on the 2nd day of April, 1897, been guilty of a contempt of this Court, doth order that the said Charles John McLeod do stand committed to the Kingstown prison for fourteen days for his said contempt.

"Dated the 3rd day of May, 1897.

"By the Court,

"Geoffrey P. St. Aubyn,

"(Seal.) "Acting Chief Justice."

The respondent, for the purpose of giving the appellant time for apologising, stayed the issuing of the committal order until the following day, May 4, on which day the appellant attended and made the following statement:—

"May it please the Court,

"Since the adjournment of the Court last night I have seriously considered my position. I am aware of the grave responsibility which rests upon me. I am aware that the loss of my freedom may entail want upon those dependent on me. But I have come to the conclusion that I cannot conscientiously do what I am asked to do, viz.:—make an affidavit pleading guilty to and expressing contrition for a crime of which I know I am innocent.

"I am prepared to express regret that I should have inadvertently and innocently, without the knowledge that it contained matter which this Court has held to be libellous and a contempt of Court, lent the man Wilson a paper for his personal use for one night. But beyond that my conscience does not allow me to go.

"Should your Honour unfortunately think that such an expression of regret is insufficient, I have no alternative but to submit, under protest, and under reserve of all rights as to appeal or otherwise, to the judgment that your Honour has been pleased to pass upon me.

"C. J. McLeod.

"St. Vincent,

"In Court, this 4th day of May, 1897."

The respondent would not accept the apology, which he considered insufficient, as not containing an expression of regret by the appellant of the nature of the publication itself. The appellant was arrested, and committed to prison for a period of fourteen days.

Now, what are the considerations applicable to the case? Committals for contempt of Court are ordinarily in cases where some contempt ex facie of the Court has been committed, or for comments on cases pending in the Courts. However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read and Huggonson.* (1) He says, "One kind of contempt is scandalising the Court itself." The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism.

It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court. On that view, was this a case in which the respondent was under the circumstances justified in making the committal order of May 3, 1897? The appellant was not alleged to be the writer or author of the article or letter in the *Federalist* of

(1) 2 Atk. 471.

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March 31. He was not the printer or publisher of the newspaper. He was a mere agent and correspondent of it at St. Vincent. On the evidence it must be assumed that he innocently, and without any knowledge of the contents, handed under the circumstances he stated the copy of the newspaper to Mr. Wilson. It would be extraordinary if every person who innocently handed over a newspaper or lent one to a friend, with no knowledge of its containing anything objectionable, could be thereby constructively but necessarily guilty of a contempt of a Court because the said newspaper happened to contain scandalous matter reflecting on the Court. The respondent arrived at the conclusion that the appellant was guilty of negligence in not making himself acquainted with the contents of the newspaper before the handing of it to Mr. Wilson. This assumes there was some duty on the appellant to have so made himself acquainted. That is a proposition which cannot be upheld. A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish. Their Lordships are of opinion the appellant was not under the circumstances of this case guilty of a contempt of Court. Their Lordships are also of opinion the apology offered by the appellant before his committal contains sufficient to have called on the respondent to stay his hand. It is an unconditional expression of regret for the act for which he was arraigned. Their Lordships will therefore humbly advise Her Majesty that the order of May 3, 1897, be rescinded and this appeal allowed. The respondent will pay to the appellant his costs of this appeal, but from the date on which the appellant was permitted to proceed with his appeal in formâ pauperis his costs will only be allowed on that footing.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondent: *John Fawcett.*

[PRIVY COUNCIL.]

FARRELLY AND ANOTHER . . . . . DEFENDANTS; J. C.*

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CORRIGAN . . . . . PLAINTIFF. *May* 17; *June* 17.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Probate—Legatee preparing Will in his own Favour—Findings of Jury—Motion for New Trial.

On a motion for a new trial made by the executors after the Court had excluded from probate a pecuniary legacy exhausting nearly the whole of the testator's estate to his confidential agent who had drawn the will, it appeared that the jury had properly found that the testator knew and approved its contents except as regards the above bequest, which he did not know and approve of, but had in a rider expressed its belief that the testator intended to give to said legatee half his property:—

Held, that the motion was properly refused. The rider did not neutralise but rather supported the verdict, for, if correct, it shewed that the will did not truly express the testator's intention.

APPEAL by special leave from a judgment of the Supreme Court (Dec. 8, 1896) refusing an application for a new trial.

The question at the trial was as to the validity of the will of James Corrigan, deceased, and particularly as to whether the testator knew and approved of a certain legacy of 4000*l.* therein contained, and in favour of one William Farrelly, a son of one of the appellants and a confidential agent of the deceased, who had prepared the will.

The facts of the case, the proceedings in the suit, and the findings of the jury are set out in the judgment of their Lordships. The result of the trial, it will be seen, was to exclude from probate the above-mentioned legacy of 4000*l.*, on the ground that the testator did not know or approve of it. The jury, however, added to their finding to that effect an expression of belief that the testator intended to leave half of his property to William Farrelly.

* *Present:* LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and LORD DAVEY.

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The motion for a new trial was on the ground of misdirection and of the findings being against the weight of evidence. A majority of the Court (the Chief Justice dissenting) refused it.

Inderwick, Q.C., and *Marshall Hall, Q.C.*, for the appellants, contended that the Chief Justice was right, and that the findings of the jury were against the weight of evidence, and were, moreover, neutralised by the expression of the jury's belief. It was not in controversy that the testator at the date of the execution of the will believed his property to be worth 8000*l.* Consequently, the jury in effect found that the will substantially expressed the testator's true intention. That removes the primâ facie suspicion which attaches to the circumstance of the will having been prepared by the legatee in his own favour. The judge in the circumstances should have directed the jury that if that suspicion was removed by satisfactory evidence of the testator's real intention, if it appeared that that intention was to give him a benefit substantially equivalent or believed to be substantially equivalent to that expressed in the will, then the law does not require any particular species of proof as to the precise form or language of the intended gift any more than in an ordinary case in which no suspicion had originally existed. The judge should have directed them that in such a case the ordinary rule as to proving the testator's knowledge of the details of the will applies, and that the evidence on that point should be dealt with on the ordinary footing, and without imposing any greater burden of proof on the party propounding the will than in other cases. The ordinary rule is that in the absence of fraud the fact that a will has been duly read over to a competent testator on the occasion of its execution, or its contents have been brought to his notice, that fact followed by proof of execution is conclusive evidence that he knew and approved its contents. No such direction was given; and it was, therefore, contended that the direction given was, under the circumstances, insufficient and incomplete, and in effect constituted misdirection, the result of which was that the minds of the jury were

never addressed to the true question, and they were not made acquainted with the true rule to be followed in deciding it. Reference was made to *Morrell* v. *Morrell* (1) and *Collins* v. *Elstone*. (2)

The respondent did not appear.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Supreme Court of Queensland refusing an application for a new trial of a probate action.

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The action was tried before Real J. and a special jury of four. At the conclusion of the trial the Court granted probate in solemn form of a document dated June 26, 1890, propounded as the will of James Corrigan, excluding, however, from probate a bequest of 4000*l.* to one William Farrelly, which was directed to be paid to him within one month after the testator's death.

The persons who propounded the document in question were the appellants, John Farrelly, the father of William Farrelly, and a Mr. Woolgar, who were named as executors.

Besides the legacy of 4000*l.*, the will gave 50*l.* to each of the executors, and 10*l.* to be spent in masses for the repose of the testator's soul. The residue of the estate, after payment of debts and legacies, was to be divided in equal shares between a sister and four brothers of the testator or their representatives.

James Corrigan died on March 7, 1894. On May 4 following the executors obtained probate of the will in common form. Shortly afterwards they paid the 4000*l.* to William Farrelly. The residue of the estate, divisible between the testator's sister and his four brothers, was just under 600*l.* In December, 1895, the respondent, Thomas Corrigan, who was one of the four brothers, was paid 119*l.* as his share of the estate. In February, 1896, he brought the action to have the probate revoked. The executors counter-claimed, asking for probate in solemn form.

James Corrigan, the testator, was a person of little or no education. During the greater part of his life he worked as a

(1) (1882) 7 P. D. 68. (2) [1893] P. 1.

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common labourer. In 1880, on the death of a brother who had kept a hotel at Gympie, he was sent for to help the widow in carrying on her late husband's business. John Farrelly, who had been an intimate friend of the hotel-keeper and was then clerk of the petty sessions at Gympie, assisted him with money and advice. After a time he became owner of the hotel. John Farrelly managed his business affairs for him, and laid out his money in speculations in which he was interested himself to such good purpose that Corrigan in a short time became comparatively a rich man. Before the date of his will, and down to the time of his death, he seems to have considered himself worth not less than 8000*l.*, and, undoubtedly, he looked upon John Farrelly as the man who had made him.

William Farrelly was articled with Messrs. Tozer & Conwell, a firm of solicitors at Gympie. In 1888, when he was about twenty years of age, he was intrusted with the management of the testator's affairs under his father's supervision. From that time down to the testator's death he acted as the testator's confidential agent. He had, he says, full control of all the testator's property, including his banking account.

The document propounded as James Corrigan's will was in William Farrelly's handwriting. It was prepared by him without any written instructions and without the intervention of any other adviser, and he maintained, it appears, so much secrecy about its preparation that his own father, with whom he was living at Gympie, did not know till after the testator's death who received the instructions for the will or who prepared it.

When the will was challenged it was obvious that there was a grave case to be tried. It could not be disputed that it was incumbent on those who sought to uphold the gift to William Farrelly to prove the truth and honesty of the transaction, and to remove the suspicions which the comparative magnitude of the gift and the circumstances under which the will was prepared were calculated to excite.

The trial lasted five days. With the summing-up of the learned judge no fault can be found. He explained the law with perfect accuracy in terms which have been approved by

this Board in *Barry* v. *Butlin* (1) and by the House of Lords in *Fulton* v. *Andrew*. (2) In the course of the trial, and before counsel for the executors addressed the jury in reply, he read out the questions which he proposed to leave to the jury. No objection was taken to any of them. The jury found that the will was signed by the testator and duly executed in the presence of the attesting witnesses, and that the testator was of sound mind and understanding. So far there was no difficulty. The points really in dispute were covered by Questions 3 and 4. Those questions were as follows: 3. "Was the said document read over to the said James Corrigan before he signed the same?" 4. "Did he the said James Corrigan before and at the time he so signed his name know and approve of the contents of the said document?" Before the verdict was finally settled the jury came back into court three times. First they asked the judge whether they might answer Question 4 by saying "Yes, with the exception of 4000*l*." They were told they might if they came to the conclusion that the testator knew and approved of the contents of the document except as to these words, and did not know and approve of it so far as these words formed part of the document. Then they came back again with the questions answered. But the proposed answer to Question 3 was, "No proof." The learned judge then directed the jury that there was evidence if they believed it—the evidence of William Farrelly—but they were not bound to believe him if under the circumstances of the case they were not satisfied of the fact upon the evidence. They had better retire, he said, and consider Question 3 and answer it clearly. The learned judge was certainly not wrong in telling the jury that there was evidence on the point if they believed William Farrelly. For William Farrelly stated positively that he read over the will of June 26, 1890, to the testator "slowly and carefully," and that he read over to him every word of it just as it was written. Before the jury retired the second time one of the jurymen asked the learned judge if they might say what they thought the testator's intention was. The learned judge told the jury that it could make no difference, and that unless

(1) (1838) 2 Moo. P. C. 480. (2) (1875) L. R. 7 H. L. 448.

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both parties wished it they had better not. Then the jury retired, and it seems that in their absence the counsel for Mr. Farrelly, the executor, pressed the learned judge to allow the jury to say what they proposed to add, stating that his client particularly desired it. Counsel for the plaintiff consented. So when the jury came back with the questions answered they were told that they might make the addition which they proposed to their answer to Question 4. They went out of court and added a rider. The final answer to Question 3 was simply, "No." The final answer to Question 4 was, "Yes, with the exception of the words four thousand pounds (4000*l.*) which words he did not know and approve of." The rider added to this finding was, "The jury believe the testator's intention was to leave half his property to William Farrelly."

The verdict of the jury was accepted by both parties at the time without question or comment. The learned judge was not asked to give any further direction or to submit any other question to the jury.

The executors then applied to the Supreme Court for a new trial. The grounds of the application were stated to be: (1.) that there was no evidence to support the findings in answer to Questions Nos. 3 and 4, or either of them; and (2.) that the said findings were, and each of them was, contrary to the evidence. The rider which the jury added to their answer to Question 4 was not made a ground of appeal or even mentioned in the notice of appeal. All the judges were of opinion that the grounds of appeal as alleged could not be supported. And it appeared that the trial judge was not dissatisfied with the verdict. But it was argued that the rider neutralised the effect of the verdict, and that it removed, or might be treated as removing, the suspicion which otherwise would have attached to the transaction. The view commended itself to the learned Chief Justice. He admitted that no exception could be taken "to the direction of the learned judge given under the circumstances of the trial and as applied to the contest as then existing between the parties." But, as applied to what his Honour termed "the actual state of the case as shewn by the finding of the jury," he thought the direction was "incomplete

and possibly misleading." He formulated an addition to the rule laid down in *Barry* v. *Butlin* (1), which he considered would remedy the defect. His opinion was that, owing to the "unexpected course which the case took at its conclusion, the verdict was so unsatisfactory that it ought not to be allowed to stand." The majority of the Court, however, thought that the rider in question was irrelevant and immaterial, and that if it was to be treated as involving a finding of fact it rather increased than diminished the suspicion attaching to the transaction.

Their Lordships concur with the majority of the Full Court. They have some difficulty in following the reasoning of the learned Chief Justice. They think that the propositions of law laid down by Parke B. and approved by Lord Cairns are sufficient for all cases in which a person who has prepared a will is found to take a substantial benefit under it, and they do not think that the additional rule proposed by his Honour would be a judicious amendment or an improvement in any case.

It would be superfluous to comment on the suspicious circumstances which occur in this case. It will be sufficient to observe that there are two points of grave importance on which the jury rejected the evidence tendered on behalf of the appellants. William Farrelly declared that he read the will over to the testator. The jury were asked whether the will was read over to James Corrigan before he signed it. They answered flatly, "No." Then there was another matter in contest between the parties. William Farrelly said that the testator was not an illiterate man, and asserted that he could "read well." No one could have been in a better position to judge of James Corrigan's attainments than William Farrelly. But, on the other hand, there was cogent evidence to shew that although the testator had learnt to sign his name he could neither read nor write. The point was important, because the will was in the testator's possession for a considerable time, and if the jury had been satisfied that the testator could read, they might fairly have presumed that he must have made himself acquainted with its contents, and they would hardly have found that he

(1) 2 Moo. P. C. 480.

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was ignorant of the most important provision it contained. It was important, too, in another point of view. It was admitted by William Farrelly that it was the practice of the office in the case of an illiterate testator to read the will to him in the presence of witnesses. No witness was present to hear Corrigan's will read. If Corrigan was illiterate, William Farrelly neglected his duty in departing from the established practice of the office, and it would not be easy to suggest any honest reason for the departure. It is obvious that the jury must have come to the conclusion that James Corrigan was illiterate, and indeed upon the evidence presented to them it appears to their Lordships that it would have been difficult for them to come to any other conclusion. Now, if the jury were not satisfied that the will was read over to the testator, and if they were satisfied that the testator though able to sign his name was wholly illiterate, it would seem to be scarcely reasonable to suggest that findings of fact based on these conclusions, and arrived at after much deliberation and with evident reluctance by a jury acting in the discharge of their solemn duty, ought to be set aside because the jurors chose to hazard a conjecture on a matter with which they had nothing to do, and in regard to which they were under no sense of responsibility. For they had been told that they had better say nothing about the testator's intentions, and they were warned that anything they might say on that subject could have no effect. Their Lordships think that the majority of the Full Court were probably right in supposing that the rider was added without serious thought out of regard to the character of the persons concerned. The learned Chief Justice observes that the course which the trial took at its conclusion was "unexpected"—unexpected it must have been, for there is not to be found in the judge's notes any scrap of evidence upon which the opinion expressed in the rider could have been founded. It was a mere guess, and it would not have been relevant or material if it had been based on satisfactory evidence.

If, however, it is to be taken as a fact that the testator's intention was that half his property should go to William Farrelly and half to his own relations, and that instructions

were given to William Farrelly to that effect, but that he departed from these instructions and gave himself 4000*l.* as being substantially equivalent to one half of the testator's property at the time, the case would seem to assume a more serious aspect. It would have been a grave dereliction of duty on the part of William Farrelly to have dealt with the testator's property in that way without even attempting to bring home to his mind the effect of the provision which the writer of the will was making in his own favour in substitution for that which, according to the hypothesis, the testator intended to give him. In such a case, how could there be what the law requires, "clear and satisfactory evidence that the will contained the real intention of the testator"? (1) With all deference to the opinion of the Chief Justice, there would be clear and satisfactory evidence to the contrary.

Their Lordships think that the application for a new trial was properly refused by the Full Court, and that this appeal ought to be dismissed, and they will humbly advise Her Majesty accordingly.

As the respondent has not appeared, it will not be necessary for their Lordships to make any order as to costs.

Solicitors for appellants: *Snell, Sons & Greenip.*

(1) *Baker* v. *Batt*, (1838) 2 Moo. P. C. 321.

[PRIVY COUNCIL.]

J. C.* 1898 Nov. 30; Dec. 1, 7. 1899 Aug. 1.

COOK AND ANOTHER . . . . . PLAINTIFFS;

AND

SIR JAMES GORDON SPRIGG . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.

Act of State—Concessions granted before Cession—Rights after Annexation—Jurisdiction of Municipal Courts—Crown Liabilities Act, 1888.

Held, that the appellants as grantees of concessions made by the paramount chief of Pondoland cannot, after the annexation of Pondoland by Her Majesty, enforce against the Crown the privileges and rights conferred.

Annexation is an act of State, and any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal courts are authorized to enforce.

The Crown Liabilities Act, 1888, permits such an action to be brought, but it does not empower the Court to make a declaration of right.

Secretary of State for India in Council v. *Kamachee Boye Sahaba*, (1859) 13 Moo. P. C. 22, followed.

APPEAL from a judgment of the Supreme Court (March 11, 1895).

The appellants claimed in their action—(1.) certain railway, mineral, township, land, forest, trading, and other rights in Eastern Pondoland granted to them by Sigcau, paramount chief of Pondoland, under and by virtue of certain four concessions, dated April 10, 1889, October 24, 1890, October 4, 1891, and June 30, 1893, respectively; (2.) a declaration of rights in the premises; (3.) a sum of 5000*l.* as damages sustained by the appellants, by reason of the interference by the Premier of the Cape Colony with the exercise by the appellants of their rights under the said concessions.

The respondent admitted the execution by Sigcau of the said concessions, but he alleged that at the date of the same the British Government was the sole paramount authority in

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD MORRIS.

Pondoland, and that without the consent of the said Government—which consent was not given—the said concessions were of no legal force or effect. He further alleged that the said concessions were contrary to the law and customs of the Pondos, that they were not understood by the said Sigcau and his councillors, that they were void for vagueness and uncertainty, and that no adequate consideration was paid for them by the appellants. He did not admit that the appellants had performed the conditions and stipulations which they were liable to perform by virtue of the said concessions, and he denied that prior to the year 1894 the Pondo nation was an independent State. He alleged that prior to annexation of their territory by the Cape Act No. V. of 1894 Pondoland had already been annexed to and became part of the British dominions, and that neither at that time nor at any subsequent time was any condition made binding upon either the Imperial or Colonial British Government to recognise the said concessions. He further alleged that the said concessions had never been acted upon or carried out, that they affected the lands of certain chiefs who would not by native law be bound by the said concessions, and that they could create only personal obligations, if any, against the said Sigcau.

The Supreme Court held that Sigcau was the recognised paramount chief and supreme ruler of the Pondos, and that in granting the said concessions to the appellants he perfectly well understood the nature of the rights and privileges granted by him; but it held in favour of the respondent that the grant of the said concessions was not in accordance with native customs, that the said concessions had not been carried into practical effect, and that they created no legal obligations which could be enforced in a court of law against the Government of Cape Colony, inasmuch as the said Sigcau might at any time have repudiated the said rights and privileges which he had granted to the appellants, and there would have been no remedy for such repudiation open to the said appellants. The Court further found that the appellants had spent much time and money in acquiring the said concessions, and that their conduct had throughout been honourable and reasonable,

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and, while giving judgment for the defendant, each party was ordered to bear their own costs.

Asquith, Q.C., *Roger Wallace, Q.C.*, and *Mackarness*, for the appellants, contended that they were entitled as prayed. Sigcau, the grantor of the concessions in suit, had, since his accession to power in 1888, been recognised and treated by the British Government as the sole and absolute ruler of Eastern Pondoland as an independent State. Pondoland was annexed to Cape Colony by Act V. of 1894, passed in consequence of Sigcau's deed of cession dated May 17, 1894. It was contended that at the time of making the cession of Eastern Pondoland Sigcau, as paramount chief of Pondoland, gave notice to the Government of the Colony that he desired their recognition of the concessions in suit; and that no repudiation or disapproval thereof by the Colonial Government was at any time communicated to Sigcau until after the deed of cession had been executed by him. The evidence shewed that the appellants had for upwards of five years resided in Pondoland and occupied themselves in obtaining the concessions. Many months of negotiation between Sigcau and the concessionaires preceded the grants. Full notice was given of the grants, and no disapproval intimated by the Government. The evidence shewed that Sigcau had, as he swore, the power to make grants of the nature of those in suit, that the grants had been sanctioned by all the due formalities required by Pondo law, and that they were made in good faith and for good consideration. It was accordingly contended that they became legally and equitably binding upon the said Colonial Government as soon as they had, by accepting from Sigcau the cession of Eastern Pondoland, become his successor as paramount chief of that country. The respondent became by virtue of Sigcau's cession of March 17, 1894, and of the Cape Act V. of 1894, clothed with all the rights and all the obligations attaching to or binding upon Sigcau as such paramount chief. Upon the question how far a civilised government on succeeding to the power theretofore exercised by a barbarian was bound by all the engagements he had made, they referred to the following cases: *United States*

v. *Parchemin* (1); *Strother* v. *Lucas* (2); *Smith* v. *United States* (3); *United States* v. *Auguisola*. (4) It was contended that it was impossible to reconcile the ratio decidendi of the judgment of the Court below with the doctrine laid down in those cases. The right to sue and the jurisdiction of the Court to entertain the case are given by Crown Liabilities Act, No. XXXVII. of 1888.

Sir Edward Clarke, Q.C., *Swinfen Eady, Q.C.*, and *Waggett*, for the respondent, denied that all the obligations of Sigcau were taken over by the Government, and in particular that the obligations under the concessions in suit had been so taken over. Those concessions were in their nature invalid. The land laws of the Cape Colony, to which East Pondoland was annexed, contain no provision for the granting by the Government of tracts of land or servitudes on land such as were promised by these concessions. The rights, moreover, which they purported to grant were unknown, and contrary to and in conflict with the native laws and customs of East Pondoland as the same existed and prevailed before its formal annexation. The concessions were, moreover, injurious to the interests of the native occupants of the country. They could not have been granted without the consent of all or the great majority of the native chiefs and headmen of the district. But only six chiefs were parties to them, whilst forty-three chiefs were parties to the cession of the whole territory to Her Majesty.

The evidence shewed that Sigcau was never, in fact, in territorial possession of the land over which he granted the rights in dispute. Even if the grants were valid, they depended for their continuance on the will of Sigcau as a lord despot, and were revocable by him at will The concessions themselves were never understood by Sigcau, and are void for uncertainty and are incapable of being enforced. The appellants, moreover, are shewn never to have obtained possession of the lands under their concessions. The Court has no jurisdiction to enforce the rights claimed, and therefore acted rightly in refusing to declare the same and in dismissing the suit. The doctrine

(1) (1833) 7 Peters, 51, 86.
(2) (1838) 12 Peters, 410, 436, 435, 438.
(3) (1836) 10 Peters, 326, 330.
(4) (1863) 1 Wallace, 352, 358.

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that under a cession of territory from one sovereign Power to another the grantee succeeds to all the liabilities of the grantor is carefully guarded in the case cited from 12 Peters. And in all three cases cited from Peters legislation had taken place to give effect to the rights conceded. Sigcau stands in a totally different position from the grantors in those cases. Here there was no treaty, and no legislation relating to the rights which he is supposed to have conceded. A subject cannot sue the Government which has annexed territory by an act of State to enforce claims which also by an act of State the annexing Government refuses to be bound. If it had been a case of conquest the question could not arise of enforcing obligations by the conquered. This is a case of cession, and the sovereign Powers could contract as they pleased in reference to such obligations. But whether they did so or not the municipal courts of the annexing territory have no authority or jurisdiction to revise, as it were, the terms of the cession, imply obligations which are not expressed, or enforce those which are. As between the sovereign Powers, the acts done are acts of State, not to be interpreted or enforced by municipal courts; and the same principle applies as between either sovereign Power and its own subjects in respect of the same matters. Reference was made to Halleck's International Law, 1893 ed. vol. ii. pp. 489, 493, 505, 506, 1878 ed. c. 34, ss. 21, 25, 26; *United States* v. *Pearson* (1); and *United States* v. *Boisdoré* (2), cited in the last case. Under these circumstances the rights claimed under these concessions cannot be declared against the Crown, nor can grants be ordered by way of enforcement of those rights for which grants no legislative sanction has been given.

Asquith, Q.C., replied, contending that, whether an act of State or not, the question was whether it fell within the scope of the Crown Liabilities Act, 1888. As to obligations resulting from international law or treaties being enforceable in municipal courts, and the jurisdiction to entertain the present suit, reference was made to *Triquet* v. *Batte* (3); *Thomas* v. *The*

(1) (1855) 18 Howard, 1, 13. (2) (1850) 11 Howard, 63, 96.
(3) (1764) 3 Burr. 1481.

Queen (1), and to certain Cape Colony cases, in which rights had been declared against the Crown: *Blanckenbury* v. *Colonial Government* (2); *Joubert* v. *Worcester Municipality and Colonial Government* (3); *De Beers Consolidated Mines* v. *Colonial Government*. (4)

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1899 Aug. 1.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from the Supreme Court of the Cape of Good Hope, wherein judgment was given for the defendant.

The action is brought against the Prime Minister of the Colony in his official capacity under the powers of an Act of the Parliament of the Cape of Good Hope intituled the "Crown Liabilities Act, 1888," which permits such an action to be brought in terms hereafter to be referred to.

The case made on behalf of the plaintiffs was that certain agreements or concessions were made by a native chief described as "Paramount Chief of Pondoland" granting certain privileges and rights to the appellants.

It appears to be established by proof that the appellants never in fact obtained possession of the lands or exercised the rights which these documents purported to convey; but it is argued that some effort was made to search for "graphite" in pursuance of these documents.

A considerable amount of evidence appears to have been given with the object of shewing that the rights purported to be granted were contrary to the native laws and customs prevailing in Pondoland at the time when they purported to be granted; that Sigcau was a lawless despot; and that any rights purporting to be granted by him were subject to his arbitrary power to recall them at any moment. And, further, that Sigcau did not understand the meaning or object of the documents which he was supposed to execute.

Their Lordships do not differ with the finding in fact by the Chief Justice that at the time that Sigcau executed the

(1) (1874) L. R. 10 Q. B. 31.
(2) (1894) 4 Shiel, 61; S. C. 11 Juta, 90.
(3) (1895) 5 Shiel, 303; S. C. 12 Tredgold, 305.
(4) (1892) 9 Juta, 101, 107.

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instruments in question he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed professed to convey.

Their Lordships do not think it material to enter into such questions, inasmuch as they are of opinion that the statute which gives a power to sue the Prime Minister does not involve the power of making any declaration of right in such a case. And as mere matter of form it does not contain any clause empowering the Court to make a declaration of right as against the Crown; but there is a more complete answer to any claim arising from these instruments. The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.

In this case it certainly cannot be said that there was any bargain by the British Government that Sigcau's supposed concessions should be recognised. Indeed, the only intelligible sense in which the allegations in the declaration can be under-

stood is that the breach of duty complained of consists in the refusal of the Cape Government to recognise the plaintiffs' concessions.

To quote the language of this Board, used by Lord Kingsdown in the case of *Secretary of State for India in Council* v. *Kamachee Boye Sahaba* (1), and cited in *Doss* v. *Secretary of State for India in Council* (2) :—

"Of the propriety or justice of that act" (here the refusal to recognise) "neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

At the same time, their Lordships are by no means prepared to differ from the observations of the Chief Justice that the appellants "have strong claims to the favourable consideration of the Government and Parliament of the country."

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed, the parties on each side to pay their own costs.

Solicitors for appellants : *Grant, Bulcraig & Co.*
Solicitors for respondent : *Wilson, Bristows & Carpmael.*

(1) 13 Moo. P. C. 22, 86. (2) (1875) L. R. 19 Eq. 534.

[PRIVY COUNCIL.]

J. C.* 1899 *July* 7, 11, 28.

UNION COLLIERY COMPANY OF BRITISH COLUMBIA, LIMITED, AND OTHERS . . . . . } DEFENDANTS;

AND

BRYDEN . . . . . PLAINTIFF.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . } INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of Canada—Legislative Power—British North America Act, 1867, *s.* 91, *sub-s.* 25, *and s.* 92, *sub-ss.* 10, 13—*British Columbia* "*Coal Mines Regulation Act*, 1890," *s.* 4—*Naturalization and Aliens—Chinamen.*

Held, that s. 4 of the British Columbian "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings, is in that respect ultra vires of the provincial legislature.

Regarded merely as a coal-working regulation, it would come within s. 92, sub-s. 10, or s. 92, sub-s. 13, of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by s. 91, sub-s. 25, in regard to "naturalization and aliens."

APPEAL from a decree of the Full Court (July 13, 1898) dismissing an appeal from a decree of Drake J. (May 14, 1898).

The question decided in this appeal was whether or not s. 4 (set out in their Lordships' judgment) of the local Coal Mines Regulation Act, 1890, now s. 4 of the Revised Statute No. 138 of 1897, was intra vires of the provincial legislature. The Courts below upheld its validity, and granted the injunction prayed for against the appellants.

Blake, Q.C., and *Cassidy*, for the appellants, contended that the enactment in question was not within the competence of

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR RICHARD COUCH, and SIR EDWARD FRY.

the provincial legislature. It dealt with the subject of "aliens" within the meaning of British North America Act, 1867, s. 91, sub-s. 25. It disabled Chinamen for the exercise of the ordinary right, preserved to all others, to earn their bread by their labour, for no other reason than that of their origin. By s. 91, sub-s. 25, the Dominion Parliament has exclusive legislative authority over aliens; and by s. 132 it has all powers necessary for performing the treaty obligations of Canada to foreign countries. By art. 1 of the treaty between Her Majesty and the Emperor of China, dated August 29, 1842, confirmed by the treaty of 1858, and art. 5 of the convention between the same Powers made on October 24, 1860, Chinamen have the right to take service in the Colonies, and regulations were to be made for their protection when emigrating. The British Columbia legislature has been endeavouring for years to prevent and restrict the settlement of Chinese aliens in the province in order to prevent competition with the whites. Several of such attempts have proved abortive, some because the Acts when passed were declared ultra vires, others because they were disallowed by the Canadian executive. Reference was made to the Chinese Tax Act, 1878, c. 35, which was held to be ultra vires; Acts of 1884, cc. 2, 3, 4; Acts of 1885, c. 13; of 1886, cc. 25, 26, 27, 29, 30, 31, 33, 35; Acts of 1890, c. 50; of 1891, cc. 48 and 69; of 1895, cc. 5, 59; Acts of 1896, cc. 38, 51, 56; of 1897, cc. 1 and 2; of 1898, cc. 4, 28, 46. The Dominion Parliament dealt with the subject of Chinese immigration by 48 & 49 Vict. c. 67, R. S. C. 1886, whereby it regulated the immigration of Chinese into Canada, imposed a tax or duty on every Chinese immigrant, and prohibited the organization of private tribunals by the Chinese. It was contended that the enactment in question violated the spirit of the treaties referred to, was opposed to the comity of nations, and was calculated to create complications between the British and Chinese Governments, and conflicted with the exclusive authority of the Dominion Parliament. Even if there be some aspect of the question of aliens in which aliens may be touched incidentally by the province, this

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is not such a case. The Dominion Parliament had dealt with the subject as completely as it saw fit, and it was not competent to the provincial legislature to impose further special restrictions and disabilities upon the Chinese alien immigrants into British Columbia. Reference was made to *Musgrove* v. *Chun Teeong Toy*. (1)

Haldane, *Q.C.*, and *C. Russell*, *Q.C.*, for the intervenant, contended that the enactment in question was intra vires of the provincial legislative authority. The case had two aspects: one as relating to aliens, and the other as to restricting the employment generally in mines below ground of particular kinds of labour. As regards the former, that would be within the exclusive competence of Dominion legislation. But Chinamen are not necessarily aliens. The term Chinese or Chinamen is one which is perfectly well understood in Canadian legislation, and means persons of Chinese habits and origin. It may include aliens within its meaning; but most of the Chinese who are affected by this legislation have been naturalized. Of the statutes cited on the other side as being in pari materiâ, three contain definitions of Chinese: (1.) the Act of 1898, c. 28, s. 4. [SIR E. FRY. The date of that is after the enactment in question.] (2.) Crown Lands Act, 1888, c. 66, s. 2: see Revised Statutes, 1897; (3.) Alien Labour Act, 1897, c. 2, s. 4. Assuming the case of alien Chinese, there is still the other aspect of the question. The restricting of employment generally in the manner enacted is a matter included in the class of subjects, "property and civil rights in the province," within the meaning of s. 92, sub-s. 13, of the Imperial Act of 1867. In that aspect it is within the exclusive competence of the provincial legislatures. Reference was made to *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (2); *Attorney-General for Ontario* v. *Attorney-General for the Dominion*. (3)

Taylor, *Q.C.*, for the other respondent.

Blake, *Q.C.*, replied.

(1) [1891] A. C. 272. (2) [1894] A. C. 189.
(3) [1896] A. C. 348.

1899. July 28. The judgment of their Lordships was delivered by

LORD WATSON. The appellant company carries on the business of mining coal by means of underground mines, in lands belonging to the company, situated near to the town of Union in British Columbia. The company have hitherto employed, and still continue to employ, Chinamen in the working of these underground mines.

By s. 4 of the Coal Mines Regulation Act, 1890, it is expressly enacted that, "no boy under the age of twelve years, and no woman or girl of any age, *and no Chinaman*, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground."

By the Act of 1890, the words "and no Chinaman" were added to the 4th section of the then existing Coal Mines Regulation Act, which was chapter 84 of the Consolidated Statutes of 1888, and now, as amended, is chapter 138 of the Revised Statutes of British Columbia, 1897. It is sufficiently plain, and it is not matter of dispute, that the provisions of the Act of 1890 were made to apply, and so far as competently enacted do apply, to the underground workings carried on by the appellant company.

The present action was instituted, in the Supreme Court of British Columbia, by the respondent, John Bryden, against the appellant company, of which he is a shareholder. It concludes (1.) for a declaration that the company had and has no right to employ Chinamen in certain positions of trust and responsibility, or as labourers in their mines below ground, and that such employment was and is unlawful, and (2.) for an injunction restraining the company from employing Chinamen in any such position of trust and responsibility, or as labourers below ground, and from using the funds of the company in paying the wages of the said Chinamen. The respondent averred in his statement of claim that the employment of Chinamen in positions of trust and responsibility, and as labourers underground, was a source of danger and injury to other persons working in the mines, which involved the liability of the company for damages, and was also injurious and destructive

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to the mines. He also pleaded that the employment of Chinamen in these capacities was contrary to the statute law of the province.

The appellant company, by their statement of defence, denied that there was any risk of injury arising either to other workmen in their mines, or to the mines, from the employment of Chinamen as underground miners. They pleaded that, in so far as they related to adult Chinamen, the enactments of s. 4 of the Coal Mines Regulation Act were void as being ultra vires of the legislature of the Province of British Columbia.

The case was tried in the Superior Court before Drake J. without a jury. In the course of the trial the respondent, the Attorney-General for the Province of British Columbia, who appears to have suspected that this suit was collusive, appeared by counsel, and he has since, in the character of intervenant, been a party to the litigation. It appeared from the evidence that the appellant company, in working some of their underground seams of coal, employed no workmen except Chinamen who were of full age, and that, in those parts of their workings where miners other than Chinamen were employed, no Chinamen occupied a position of trust or responsibility, such as were alleged in the statement of claim. The consequence was that, in the subsequent conduct of the litigation, the Courts below, and their Lordships in this appeal, have only been invited to consider the conclusions of the action in so far as these bear upon the legality of employing Chinese labour in violation of the express enactments of s. 4 of the Revised Statute No. 138 of 1897. In other words, the controversy has been limited to the single question—whether the enactments of s. 4, in regard to which the appellant company has stated the plea of ultra vires, were within the competency of the British Columbian Legislature.

In considering the issue to which the case has thus been narrowed, the evidence led by the parties appears to their Lordships to be of no relevancy. It is chiefly directed to the character, whether reasonable or unreasonable, of the legislation which has been impugned by the appellant company. But the question raised directly concerns the legislative authority

of the legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. There are various considerations discussed in the judgments of the Courts below which, in the opinion of their Lordships, have as little relevancy to the question which they had to decide as the evidence upon which these considerations are founded.

There can be no doubt that, if s. 92 of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the Coal Mines Regulation Act. The subject-matter of that enactment would clearly have been included in s. 92, sub-s. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in s. 92, sub-s. 13, which embraces "Property and Civil Rights in the Province."

But s. 91, sub-s. 25, extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." Sect. 91 concludes with a proviso to the effect that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Sec. 4 of the Provincial Act prohibits Chinamen who are

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of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes, ipso facto, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but s. 91, sub-s. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of "naturalization" seems primâ facie to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in s. 91, sub-s. 25. But it seems clear that the expression "aliens" occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized.

Drake J., before whom the case was tried, and on appeal the learned judges of the Full Court, were of opinion that the enactments of s. 4 of the Mines Regulation Act, so far as challenged, were within the legislative jurisdiction of the parliament of the province. They accordingly gave the plaintiff a declaration to the effect that the appellant company has no power to employ Chinamen, or to allow Chinamen to be, for the purpose of employment, in any mine of the company in British Columbia below ground, and that the employment by the company of Chinamen in their coal mines below ground at Union was unlawful, as being contrary to s. 4 of the Coal Mines Regulation Act. They also, in terms of that declaration, granted an injunction restraining the appellant company, its contractors, servants, workmen, and agents, from employing Chinamen, or allowing Chinamen to be for the purpose of

employment, in the coal mines of the company at Union, contrary to the provisions of s. 4.

The provisions of which the validity has been thus affirmed by the Courts below are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the provincial parliament by s. 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by s. 91, sub-s. 25. They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, sub-s. 10, or s. 92, sub-s. 13. But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada. The learned judges who delivered opinions in the Full Court noticed the fact that the Dominion legislature had passed a "Naturalization Act, No. 113 of the Revised Statutes of Canada, 1886," by which a partial control was exercised over the rights of aliens. Walkem J. appears to regard that fact as favourable to the right of the provincial parliament to legislate for the exclusion of aliens being

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Chinamen from underground coal mines. The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from; to find and declare that the provisions of s. 4 of the British Columbia Coal Mines Regulation Act, 1890, which are now embodied in chapter 138 of the Revised Statutes of British Columbia, 1897, were, in so far as they relate to Chinamen, ultra vires of the provincial legislature, and therefore illegal; and to order that the plaintiffs do pay to the defendant company the costs incurred by them in both Courts below as the same shall be taxed. The respondents, other than the intervenant, must pay to the appellant company their costs of this appeal.

Solicitors for appellants: *Longbourne, Stevens & Co.*
Solicitors for intervenant: *Gard, Hall & Rook.*
Solicitors for other respondent: *Andrew Wood & Purves.*

[PRIVY COUNCIL.]

MONTREAL GAS COMPANY . . . . DEFENDANTS; J. C.* 1899

AND

CADIEUX . . . . . PLAINTIFF. July 13, 28.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Canada Act (12 *Vict. c.* 183), *s.* 20—*Construction—Right to stop Supply of Gas generally.*

Held, that, by the true construction of s. 20 of the Canada Act (12 Vict. c. 183), borrowed from the Gasworks Clauses Act, 1847 (Imperial Parliament), the appellant company is authorized to cease supplying the respondent with gas at any of his houses on his neglect to pay its bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be implied.

APPEAL by special leave from a judgment of the Supreme Court (May 6, 1898) reversing by a majority a judgment of the Court of Queen's Bench of Quebec (October 29, 1896) and restoring the order of Mathieu J. (May 4, 1896) who had issued a mandamus to the appellant company.

The question decided in this appeal was as to the true construction of s. 20 of 12 Vict. c. 183 (Canada). The right claimed by the appellants thereunder was to cut off the supply of gas from, and refuse to supply gas to, not only those premises of the respondent in respect of which their gas bill was in arrear, but also from and to all other premises in the same occupation, although the respondent had duly paid their bill in respect of these latter. The first Court was of opinion that as the appellants were under an obligation to supply gas to the inhabitants of Montreal against payment, their right to cut off the supply was limited to the premises in respect of which payment was in arrear, and did not extend to all premises in the same occupation. The second Court held that the appellants'

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR EDWARD FRY, and SIR HENRY STRONG.

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charter gave them power to terminate their supply of gas generally to all the respondent's premises so long as he neglected to pay in respect of any one of them. The third Court held that the power to cut off gas was not intended to and did not cover all the respondent's buildings, since he was in default with regard to one of them only.

Blake, Q.C., for the appellants, contended that the second Court was right. The true interpretation of the section did not limit the appellants' right in the manner contended for. There were no words to that effect. Such limitation could not be implied as a reasonable one. The supply is to the consumer, not to the building; the liability is personal to the consumer, and is not that of the building.

McMaster, Q.C., and *Loehnis*, for the respondent, contended that the first and third Courts were right. The obligations of the company to the respondent were under separate contracts in respect of the separate buildings. Breach of one of them did not involve breach of the other. By the true construction of the section, the right of the appellants to cut off gas is confined in every case to the particular contract in respect of which a breach has occurred. The construction contended for by the appellants is unreasonable, and, considering their monopoly of supply, oppressive.

Blake, Q.C., was not heard in reply.

1899 *July* 28.

The judgment of their Lordships was delivered by

SIR HENRY STRONG. The appellants are a company formed for the purpose of making and supplying gas in Montreal. They were incorporated in 1847 by a statute of the Province of Canada, 10 & 11 Vict. c. 79, under the name of "The New City Gas Company of Montreal." Their name was changed in 1879 to "The Montreal Gas Company" by a statute of Quebec, 41 Vict. c. 81.

The respondent was a customer of the Montreal Gas Company. He had two sets of premises in Montreal—1125, Notre Dame Street, and 282, St. Charles Borromée Street, where he resided. He took gas from the company for

both. The question is whether he is entitled to require the company to supply gas for the one set of premises while he neglects to pay his gas bill for the other.

The answer to the question must depend upon the statutory powers of the company. Originally the company had no special power bearing on the question. But in 1849 their powers were extended by a statute of the province of Canada, 12 Vict. c. 183, so as to enable them to deal with defaulting customers.

Sect. 20 of the Act of 1849, which was evidently borrowed from the Gasworks Clauses Act, 1847, of the United Kingdom, is so far as material in the following terms: "If any person . . . . supplied with gas by the company shall neglect to pay any rate, rent, or charge due to the . . . . company at any of the times fixed for the payment thereof it shall be lawful for the company . . . . on giving twenty-four hours' previous notice to stop the gas from entering the premises, service-pipes, or lamps of any such person . . . . by cutting off the said service-pipe or pipes, or by such other means as the company shall think fit."

Then follows a power for the company to recover the amount due to them at the time "notwithstanding any contract to furnish for a longer time," and also a power within certain hours of the day to enter the premises and remove their own property on giving twenty-four hours' previous notice "to the occupier or person in charge."

The respondent was not altogether a desirable customer. He was tardy and irregular in his payments. Between February, 1890, and December, 1896, the company had to send him fifteen notices threatening to cut off his supply before the accounts were paid, and on five occasions they had to cut off the supply for non-payment.

On September 19, 1895, the company were compelled to cut off the gas at No. 1125, Notre Dame Street for non-payment of the bill for gas supplied to that house. This measure had no effect in producing payment. The company then gave the respondent notice that unless their bill was paid they would cut off the gas at his residence, No. 282, St. Charles Borromée

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Street also, and at last, after repeated notices to that effect, the company carried their threats into execution and cut off the gas at No. 282, St. Charles Borromée Street as well as at No. 1125, Notre Dame Street.

Instead of paying what he owed to the gas company, the respondent brought this action to compel the company to continue the supply of gas at his residence. The superior Court decided in his favour. The Court of Queen's Bench unanimously reversed that decision. The Supreme Court, consisting of Gwynne, Sedgwick, King, and Girouard JJ., Taschereau J. dissenting, reversed the decision of the Queen's Bench. From the judgment of the Supreme Court this appeal has been brought by special leave.

The case appears to their Lordships to be too clear for argument. The only question is a question of fact. Is the respondent, in the words of the Act, a person supplied with gas by the company who has neglected to pay a rate rent or charge due to the company at the time fixed for the payment thereof? It cannot be disputed that he is. The occasion, therefore, has arisen which authorizes the company to stop the gas from entering his service-pipes. There is nothing in the Act to limit the right of the company to the service-pipes of the defaulter in a particular building or connected with a particular meter in respect of which the default has been committed. There is nothing in the Act to throw the rate, rent, or charge for gas upon the premises for which the supply is furnished, or to make it payable out of the premises of the defaulter. The supply is to the consumer and the default is the consumer's default. His liability to the company is a liability for the whole of the debt which he owes them at the time.

The argument of Girouard J., who delivered the judgment of the Supreme Court, seems to be this: the power given to the company of stopping the supply of gas to a customer who neglects to pay his gas bill is an "exorbitant" power. The provision must, therefore, be construed strictly. The only reasonable way of construing it is to limit the power to the particular building in respect of which the default has been committed: any other construction would lead to unreasonable

consequences. If a corporation, for instance, took a supply of gas for their streets and also for their public buildings, it would be unreasonable to cut off the supply for the streets merely because the corporation neglected to pay the gas bill for their buildings.

Their Lordships are unable to see anything unreasonable in the particular instance given, or anything unreasonable in a provision authorizing a gas company to cease supplying a customer who will not pay his gas bills; but the real answer to the argument of the learned judge is that it is not for the Court to pronounce an opinion upon the policy of the Legislature. Their only duty is to give effect to the language of the Legislature construing it fairly. It seems impossible to find the limitation in question in the language of the statute without introducing some proviso or some qualifying words which are not there.

In the result, therefore, their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, and that the respondent ought to pay the costs in the Courts in Canada.

There will be no costs of the appeal to Her Majesty.

Solicitor for appellants: *S. V. Blake.*

Solicitors for respondent: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[PRIVY COUNCIL.]

J. C.* 1899 — March 10, 15, 22; July 8.

THE TRINIDAD ASPHALT COMPANY AND ANOTHER . . . . . } PLAINTIFFS;

AND

AMBARD AND ANOTHER . . . . . DEFENDANTS.

AND CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Law of Trinidad and Tobago—Adjacent Lands—Right to Lateral Support—Escape of Pitch—Injunction—Damages.

Where the defendants by removing the lateral support of their land caused the asphalt or pitch which formed the main ingredient of the plaintiffs' land to melt and ooze forth into their own land and thereupon appropriated it to their own use:—

Held, that an injunction was rightly granted by the first Court to restrain them, and that damages were recoverable both for injury caused by subsidence of the plaintiffs' surface and for loss of the pitch.

CROSS APPEALS from a decree of the Court of Appeal of the Supreme Court (Dec. 21, 1897) reversing a decree of Goldney C.J. (May 5, 1897).

The question decided in this appeal relates to the relative rights of adjacent proprietors, whether one of them can so work and win the pitch lying under his land as to withdraw its lateral support to the adjacent land, and thereby cause an outflow of pitch from such land and a subsidence of its surface.

The appellant company, under the circumstances stated in the judgment of their lordships, sued the respondents in damages and for an injunction, for that they had wrongfully dug out and removed their own land without leaving proper and sufficient support for the plaintiffs' adjacent lands, the surface of which had thereby been caused to subside; that buildings and a wire fence thereon had been weakened and

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and LORD DAVEY.

injured; and that the respondents had wrongfully caused asphalt and pitch to slide from the appellants' land into and upon their own lands, and had thereupon appropriated the same.

The respondent pleaded amongst other things that, in the exercise of their proprietary and winning rights and in the natural course of user, they caused the asphalt deposits lying under their own land to be dug out and removed, and that such work was conducted in a proper manner and without negligence, and that if any damage had been caused it was due to natural causes.

The judgment of the Chief Justice was in favour of the appellant company for 100*l.* damages and an injunction. After considering the law relating to the support of land by adjacent land, and the cases turning on damage done by the percolation of water, he held that pitch was part of the soil, and as such was entitled to lateral support. He also held that the property in the pitch vested in the proprietor of the soil whether the same was actually gotten by him or not. The damages were assessed mainly with regard to the value of the pitch which had flowed into the excavation made by the respondents and had been appropriated by them.

In appeal, Nathan and Lewis JJ. agreed in holding that the appellant company had no property in any pitch which might have flowed from their land on to that of the respondents, and that the injunction ought to be discharged; but they differed on the question as to whether or not the appellant company had any cause of action by way of damages for loss of support to the surface of their land by reason of any outflow of pitch caused by the operations of the respondents. Nathan J. held that the appellant company had no such right, and that the respondents were entitled to have the entire judgment of the Court in their favour; but Lewis J. held that the appellant company had a cause of action for loss of support to the surface.

Goldney C.J. adhered to his previous judgment.

Haldane, Q.C., G. Lawrence, and *Previté*, for the appellants, contended that they as proprietors of land had a right to have

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it laterally supported in its natural state by the adjoining land in possession of the respondents. That right is not adversely affected by the circumstance that a portion of the appellants' subsoil consists of pitch. Although pitch when melted is of a mobile or fluid character, it is not water, but part of the soil. The principles of law regulating the rights of an owner of land to abstract underground water not flowing in a defined channel do not apply. There is no analogy between pitch, which is a mineral, and water. Even if those principles did apply, there is this limit to their application—that underground water may not be abstracted by an adjacent proprietor if, by so doing, he withdraws support and causes subsidence. Here, if the pitch is undisturbed, it remains at rest. Directly there is excavation of adjacent land the pitch gets into motion, fills up the excavation, and, consequently, the surface of the land from which the pitch is being drained subsides, and any houses thereon are damaged or destroyed. The leading case relative to the right of lateral support is *Dalton* v. *Angus*. (1) The cases in reference to rights over underground water in alieno solo as distinct from pitch are *Race* v. *Ward* (2); *Ballard* v. *Tomlinson*. (3) Then *Higgon* v. *Mortimer* (4); *Powell* v. *Rees* (5); *Humphries* v. *Brogden* (6), cited in *Dalton* v. *Angus* (1); *Corporation of Birmingham* v. *Allen* (7); and see *Caledonian Railway* v. *Spratt* (8), with regard to a landowner's rights in his soil and to the support thereof. The right to support being established it follows that if on its withdrawal the appellant's pitch passes upon the respondent's land, and is appropriated, the measure of damages in that respect is the value of the pitch abstracted. Further, if they disturb the status quo, and cause the appellant's land to subside, they must answer any loss thereby inflicted. Reference was made to *Stroyan* v. *Knowles* (9); *Brown* v. *Bolins*. (10)

Moulton, Q.C., *Alcazar, Q.C.*, and *Abraham*, for the respond-

(1) (1881) 6 App. Cas. 740, 808.
(2) (1855) 4 E. & B. 702.
(3) (1885) 29 Ch. D. 115.
(4) (1834) 6 C. & P. 616.
(5) (1837) 7 Ad. & E. 426.
(6) (1850) 12 Q. B. 739.
(7) (1877) 6 Ch. D. 284, 289.
(8) (1856) 2 Macq. 449, 451.
(9) (1861) 6 H. & N. 454.
(10) (1859) 4 H. & N. 186.

ents, contended that pitch ought not to be regarded as part of the soil. It is of a semi-fluid and fugitive nature. Where land rests on a semi-fluid there is no absolute right of support. Pitch must be regarded as in the category of water. Its withdrawal from the land where it is originally found to the adjacent land is due to its own action and character, and it does not come within the class of cases which relate to solid support of solid soil. The respondents are entitled to work and win in the ordinary course the pitch or asphalt lying under their own land. They are under no obligation to abstain therefrom and to leave their own pitch, which forms the chief portion of the value of their land in situ, in order to afford lateral or vertical support to the pitch or asphalt underlying the appellants' land. Even if by their operations on their own land pitch escapes from the appellants' land, the latter are not damaged thereby, for they had no property therein merely because it was until disturbed situated in their land. Owing to its semi-fluid character it did not become their property until they had reduced it into possession—that is, had abstracted it from their land. Assuming the analogy of pitch to water, the law is contained specially in these two cases: *Popplewell* v. *Hodkinson* (1); *Elliott* v. *North Eastern Ry. Co.* (2) [LORD HOBHOUSE. The real question is as to the right to support, whether it is absolute or is modified having regard to the properties and character of pitch.] The outflow of pitch from the appellants' land was natural. Even though it resulted from the operations of the respondents in the sense that it would not have otherwise occurred, still, the immediate cause of the overflow is to be found in the semi-fluid nature of the ingredient. The disturbance of the surface of land ensuing from the subterranean movement of pitch is a matter of constant occurrence, and forms one of the incidents of the locality. The appellants acquired their land with a full knowledge that the pitch, which gave it its value, was of a fugitive nature, and have no right to complain of rightful operations of the respondents on their own land merely because they result in losses to themselves, which are due directly to

(1) (1869) L. R. 4 Ex. 248. (2) (1863) 10 H. L. C. 333.

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the special character of their own soil, and only indirectly to the lawful acts of the respondents, done without negligence or illegal intention, in the lawful exercise of their own proprietary rights, from which they cannot be restrained without seriously detracting from the value of their land. Reference was also made to *Smith* v. *Thackerah* (1); *Holland* v. *Worley*. (2)

Haldane, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. At La Brea in the island of Trinidad, where the land slopes down from the Pitch Lake (3) to the sea a distance of about a mile, there is found near the surface a stratum of asphalt or pitch. Pitch lands, as lands within this district are called, are not cultivated, nor are they apparently suitable for cultivation. Their whole value depends on the pitch they contain. Of late years there has sprung up a great and an increasing demand for this substance. It is now worth 20*s*. a ton. With the increase in the value of pitch there has been a corresponding rise in the value of pitch land. A lot which might have been bought for $40 a few years ago would now it seems probably fetch not less than $4000.

In some few places the pitch crops out on the surface of the ground. For the most part it lies at a depth varying from four to seven feet. So long as it is undisturbed it is stable and firm enough to support the soil above it in its natural state. But if an excavation is made and the stratum of pitch cut through, the consequence is that the edge exposed to the influence of the heated atmosphere begins to melt and the pitch oozes out. It may then be collected at the bottom of the excavation or caught as it is exuding. "Pitch," as one witness said in answer to a question by the Court, "bulges out and they shave it off each morning. That," he added, "is the plan adopted when you want to dig your neighbour's pitch."

The original plaintiffs, the Trinidad Asphalt Company, to whose rights the new company lately added as appellants have

(1) (1866) L. R. 1 C. P. 564.
(2) (1884) 26 Ch. D. 578, 581.
(3) [The "lake" is no more liquid than the stratum of pitch in question in the case.—F. P.]

succeeded, were the owners of a lot of pitch land containing about a quarter of an acre and known as Lot 15A. The lot immediately adjoining it on the side towards the sea and lying at a somewhat lower level belonged to the defendant Ambard. It was known as Lot 15. In January, 1896, the defendants began digging for pitch on Lot 15. They dug right up to Lot 15A to a depth of twelve feet, and so close to the boundary that some of the boundary posts fell in. The excavation was continued the whole length of the boundary line except for the space of about ten feet on one side, which was left as a loading place.

The usual results followed. The section of the stratum of pitch thus exposed to the atmosphere began to melt. The pitch oozed out and the excavation yielded abundantly. Between 200 and 300 tons of pitch were "won," as the phrase goes. The surface of the plaintiffs' land began to sink and crack. A depression was formed in shape like half a saucer about five feet deep in the centre at the boundary line, and going back in a semicircle with a radius of about sixty feet. A series of cracks appeared on the surface from eight to ten feet long by six to eighteen inches wide, and some buildings or sheds of no great value were more or less wrecked.

For this injury to their property the plaintiffs sued the defendants, asking for an injunction and damages.

The action came on for trial before Sir John Tankerville Goldney C.J. His Honour granted an injunction restraining the defendants from digging and winning or otherwise removing asphaltum from the parcel of land known as Lot 15 in such a way as to destroy or seriously injure the surface of the plaintiffs' Lot 15A, and the sum of 100*l.* was awarded by way of damages.

From this judgment there was an appeal to the Full Court. The appeal was heard by the Chief Justice and Nathan and Lewis JJ. The learned Chief Justice adhered to the opinion he expressed at the trial. The other two learned judges differed from him and differed from each other. Nathan J. was for dismissing the plaintiffs' action altogether with costs. Lewis J. was of opinion that as a matter of law the plaintiffs were

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entitled to support for their lands, but his conclusion was that no injunction ought to have been granted, and that the damages should be reduced to 10*l.* He thought 10*l.* "would amply compensate the plaintiffs for damage through mere subsidence." He considered that the injury caused to the plaintiffs' land by the withdrawal of pitch from it ought not to have been taken into account at all. In the result the order of the Court was that the judgment of his Honour the Chief Justice be set aside so far as regards the injunction, that the sum of 100*l.* allowed as damages be reduced to 10*l.*, that the Chief Justice's order as to costs be set aside, that each party do bear their own costs of the hearing before the Chief Justice, and that the plaintiffs do pay to the defendants the costs of the appeal.

From this order both parties have appealed to Her Majesty in Council.

Their Lordships have to determine between the conflicting views of the Chief Justice and Nathan J. The judgment of Lewis J., who agreed to a certain extent with each of his colleagues, may be laid on one side. If his Honour is right in his premises it is plain that his conclusion is opposed to the principles and practice of the Court. Assuming that the plaintiffs were entitled to have their land in its natural state supported by the adjacent land belonging to Ambard, it would seem to follow as a matter of course that this right which the defendants have invaded should now be protected by injunction, and not the less so because in his Honour's view the damages that could be recovered at law would be only trifling. Certainly the decision of the learned judge, if it were to prevail here as it did in the Full Court, would leave the plaintiffs in a very unfortunate position. The defendants were not to be restrained from digging. They might, therefore, drain as much pitch as they could from the plaintiffs' land, and sell it and pocket the price. They would only be liable for consequential injury to the surface of the plaintiffs' land overlying the stratum of pitch, and for injury to the plaintiffs' buildings. The buildings all told are only worth a few pounds. The surface without the buildings is of such a sort that it would be little or none the worse for cracks and depressions. Even if the plaintiffs cared

to bring actions in which they could recover no substantial damages, and would not be wholly indemnified against costs, the defendants at the outside would only have to pay in each case damages all but nominal and the costs of an undefended action. Of course the defendants would go on with their digging as long as there was any pitch to be got. The pitch won from the plaintiffs' land would pay the costs and damages over and over again. And in the meantime the plaintiffs would have to look on and see the value of their land destroyed for the time, if not for ever, by the withdrawal of the one valuable element in its composition. A conclusion so lame and impotent seems hardly in accordance with the principles of equity or common sense.

The judgment of Nathan J. is not inconsistent with itself. But it appears to be founded on a mistaken analogy. Water dropping from the clouds on the face of the earth and percolating the ground in no definite channel is not the property of any man until it has been appropriated. The pitch which is the peculiar product of this strip of land in the island of Trinidad resembles water in one respect. At a certain temperature it becomes liquid. When it is liquid its behaviour is more or less like the behaviour of water or any other fluid. It has no angle of repose. From these premises Nathan J. infers that this underground stratum of pitch is no man's property until it has been appropriated, and his conclusion is that, just as no action will lie for collecting or pumping up underground water percolating the earth in no defined channel, though the supply may be withdrawn from a neighbour's property, and the withdrawal may leave his well dry and useless, so anybody and everybody who owns a lot in the village of La Brea may with impunity win the pitch lying under his neighbour's land. So far the two learned puisne judges were agreed. They differed only on one point. Nathan J. thought that it was decided that an owner of land has no right at common law to the support of subterranean water. That is the head-note in *Popplewell* v. *Hodkinson*. (1) Lewis J. thought that the head-note was not warranted by the decision. Nathan J. therefore

(1) L. R. 4 Ex. 248. [See this case discussed in the C. A. in *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217.]

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came to the conclusion that the plaintiffs had no case at all, while Lewis J. thought they were right up to a certain point and gave them a barren victory.

The judgment of the learned Chief Justice is short and to the point. The argument which Nathan J. has elaborated with much ingenuity and learning is dealt with by anticipation in a single sentence. "Asphaltum," observes the Chief Justice, "is a mineral—not water." He found that the defendants had interfered with the plaintiffs' right of support, that they had let down the surface of the plaintiffs' land, and consequently done injury to the plaintiffs' house; and also that the plaintiffs had suffered injury by the loss of the asphaltum which, on the removal by the defendants of the lateral support of their land, passed into the defendants' land, and was appropriated by them to their own use.

Their Lordships agree with the learned Chief Justice. It is not necessary to discuss the question on which Lewis J. differed from Nathan J. as to the right of support from subterranean water, because, as the Chief Justice observes, the substance which afforded support in this case was not water. As was laid down by the Court of Queen's Bench in *Humphries* v. *Brogden* (1), the nature of the strata must be immaterial; it is impossible for the Court to measure out degrees to which the right of support for the surface may extend. "The only reasonable support," as Lord Campbell observed, "is that which will protect the surface from subsidence and keep it securely at its ancient and natural level." The damages awarded by the Chief Justice do not appear to their Lordships to have been assessed on a wrong principle or, under the circumstances, to be excessive.

One argument was addressed to their Lordships which, perhaps, ought to be noticed. It was said that digging for pitch was the common industry of La Brea, and that if an injunction were granted the industry would be stopped altogether. In the first place there is no evidence that that would be the result. Whatever the result may be, rights of property must be respected, even when they conflict, or seem to

(1) 12 Q. B. 739, 745.

conflict, with the interests of the community. If private property is to be sacrificed for the benefit of the public, it must be done under the sanction of the Legislature, which can, and generally does, provide compensation. If the inhabitants of La Brea cannot dig their own pitch without invading their neighbours' rights, it is quite possible that the hope of reciprocal advantage and the apprehension of mutual liability may lead to some arrangement for their common benefit, or the difficulties of the case may induce the Legislature to step in and regulate the digging of pitch and the management of the pitch lands.

Their Lordships will, therefore, humbly advise Her Majesty that the plaintiffs' appeal ought to be allowed and the cross-appeal dismissed, and the decision of the Full Court set aside with costs, and the judgment of the Chief Justice restored.

The respondents Ambard and François will pay the costs of the appeal and cross-appeal.

Solicitors for appellants: *Sutton, Ommanney & Rendall.*
Solicitors for respondents: *J. N. Mason & Co.*

[PRIVY COUNCIL.]

J. C.* 1899 July 25, 28.

ANCTIL . . . . . PLAINTIFF;

AND

MANUFACTURERS' LIFE INSURANCE COMPANY . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Civil Code of Lower Canada, Art. 2590—*Validity of Life Policy—Lawful Holder.*

In an action on a policy of life insurance :—

Held, that the plaintiff was not a lawful holder. As "the protector of the deceased whenever he stood in need of protection" he had not an insurable interest in his life within the meaning of art. 2590 of the Civil Code of Lower Canada :

Held, further, that a condition in the policy that the same should on the lapse of a year or upwards during which premiums have been regularly paid become incontestable is no answer to an objection founded on the terms of the Code.

APPEAL from an order of the Supreme Court (Dec. 9, 1897) dismissing the appellant's action and entering judgment for the respondents.

The facts are stated in the judgment of their Lordships.

The Solicitor-General for Canada (*Fitzpatrick*) and *F. Russell*, for the appellant, contended that the English statute (14 Geo. 3, c. 48) relating to so-called wagering policies, which renders such policies expressly "null and void to all intents and purposes whatsoever," has no application to Lower Canada. The local law relating to policies of life insurance is to be found in the Civil Code of Lower Canada, bk. iv. tit. v. c. 3, and art. 2590 was specially referred to, and it was contended that the appellant came within its terms, and was therefore a lawful holder. The respondents were estopped by what was called the one year clause from disputing their liability. There was nothing against public policy in that clause.

* *Present:* LORD WATSON, LORD MACNAGHTEN, and SIR HENRY STRONG.

Th. Casgrain, *Q.C.*, and *Grier*, for the respondents, were not heard.

1899. July 28. The judgment of their Lordships was delivered by

LORD WATSON. This action was brought by the appellant, Joseph Napoléon Anctil, against the respondent company, for recovery of the contents of a policy of insurance issued by the company on May 12, 1894, on the life of one Antoine Pettigrew. The amount of the insurance, which was for $2000, was by the policy made payable to the appellant, his executors, administrators, and assigns, under deduction of the premium for the current year, upon its being proved, to the satisfaction of the office, that the death of the assured had taken place whilst the policy was still current.

One of the conditions of the policy which has led to the present controversy, was in the following terms: "Après que cette police aura été en vigueur une année entière, elle sera incontestable par rapport à quelque motif que ce soit, pourvu que les primes ici mentionnées aient été payées promptement, et que l'âge de l'assuré ait été admis." It is unnecessary for the purposes of this appeal to refer to the other conditions, or bénéfices, as they are termed, which are incorporated with the policy, which expressly bears that these conditions are applicable: "Ainsi que les dispositions au verso de cette police, font aussi complètement partie de ce contrat que s'ils étaient énumérés au-dessus des signatures ci-dessus apposées." Antoine Pettigrew died on October 6, 1895, when the policy had been current for more than a year, and the premiums had been regularly paid. The present action was raised by the appellant on December 19, 1895.

In answering the proposals and queries submitted by the agent of the appellant company, which were thus referred to and made to form the basis of the contract of insurance, Antoine Pettigrew, in reply to the eighth question, which required him to give the name and address of the party who was to have the benefit of the contract, stated, "Joseph Napoléon Anctil, Rivière-du-Loup station." To the ninth

J. C. 1899 ANCTIL v. MANUFACTURERS' LIFE INSURANCE COMPANY.

question, which had reference to the relation between him and that person, he replied, "Mon protecteur, si toutefois j'en ai besoin." To the tenth question, which made the inquiry to whom he desired the benefit of the contract to accrue on the expiry of the period of dotation, which was at the end of fifteen years from the date of the policy, Antoine Pettigrew answered, "A moi-même."

It was argued for the appellant that the effect of the tenth answer was to give Antoine Pettigrew a proprietary interest in the policy. That may be so, but his interest was contingent upon his surviving the date of the policy for a period of fifteen years. In the event of his death at any time during that period the sole owner of the policy was the appellant, Anctil.

By art. 2590 of the Civil Code of Lower Canada it is enacted in regard to life assurance: "The insured must have an insurable interest in the life upon which the assurance is effected.

"He has an insurable interest in the life:—

"1. Of himself.

"2. Of any person upon whom he depends wholly or in part for support or education.

"3. Of any person under legal obligation to him for the payment of money, or respecting the property or services which death or illness might defeat or prevent the performance of.

"4. Of any person upon whose life any estate or interest in the insured depends."

The only insurable interest which the appellant had in the life of Antoine Pettigrew, as stated in the proposals for insurance, was that the appellant was the protector of Pettigrew, whenever he stood in need of protection, which, if true, was an interest the very reverse of what is required by art. 2590 of the Code.

The action led to a considerable amount of litigation. It was tried in the Supreme Court before Cimon J. and a jury, who returned a verdict in the shape of answers to no less than twenty questions submitted to them by the learned judge. The verdict was then reported to the Superior Court, sitting in

review, consisting of Caron, Andrews, and Cimon JJ. The appellant moved the court for judgment in his favour, whilst the respondent company moved for judgment non obstante veredicto, or for a new trial. Caron and Andrews JJ. (dissentiente Cimon) refused the appellant's motion, and granted a new trial on the ground (1.) that, although the "incontestable" clause of the policy was a good answer to innocent misrepresentations, nevertheless (2.) it was not a good answer to the allegation that the policy was a wager policy; and (3.) that the policy was a wager policy, in which the appellant, the payee, had no insurable interest.

An appeal was taken by the present appellant to the Court of Queen's Bench for Lower Canada, when five learned judges unanimously reversed the judgment of the Superior Court sitting in review, and entered judgment for the appellant, on the ground that (1.) "the one year clause" was a good answer to alleged innocent misrepresentations, and (2.) that the jury had found on the evidence that the policy had been taken out by Pettigrew, and not by the appellant.

The respondent company then appealed to the Supreme Court of Canada, who, on December 9, 1897 (Sedgewick J. dissenting) reversed the order of the Queen's Bench, dismissed the appellant's action, and entered judgment for the respondent company. The learned judges of the Supreme Court were of opinion (1.) that the policy was null and void, having been entered into with the appellant in his own name, for his own benefit, and he having no insurable interest in the life of Pettigrew; (2.) that "the one year clause" was contrary to public law and order; and that the respondents were not estopped, by "the one year clause," or otherwise, from disputing the validity of the policy.

Their Lordships have now to determine whether the judgment of the Supreme Court of Canada ought to be affirmed simpliciter, or whether there ought to be judgment entered for the appellant, or the case sent back for a new trial. In considering these two last questions, it is legitimate to refer to the evidence led before the jury, for the purpose of ascertaining whether, on a second trial, the facts found by the jury, bearing

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upon the insurable interest of the appellant, are capable of substantial or any modification. Their Lordships are satisfied that, were a new trial allowed, these findings would be strengthened as against the appellant, but could not be modified in his favour. They have also arrived at the conclusion that the facts as found by the jury are, in the circumstances of this case, sufficient to shew that the appellant had no insurable interest in the life of Antoine Pettigrew.

In the first place, it must be observed that, although the terms of the policy, and of the proposals upon which it is based, are such as to cast upon him the onus of proving that he had an insurable interest, the appellant has not in his pleadings alleged, and has not attempted to establish by proof, that he possessed any such interest as is required by art. 2590 of the Code. The only contribution, if it can be so called, to that inquiry made by the testimony of the appellant consisted in the assertion that his wife's grandmother was the cousin-german of Antoine Pettigrew. That is the evidence upon which the jury, in answer to question 8 (*b*), found that there was "distant relationship" between Pettigrew and the appellant.

The jury, in answer to question 2 (*a*), found that all the premiums in the policy had been regularly paid up to the death of Antoine Pettigrew; in answer to question 5, that Pettigrew was, at the time of the policy, and since, a poor man without any means whatsoever; and, in answer to question 6 (*d*), that it was the appellant who paid all the premiums. In answer to question 3 (*a*) and (*b*), they found that Pettigrew had signed the application for the policy with his mark of a cross, in presence of Hélène Ouellet, as witness, she being the wife of the appellant. In his evidence the appellant explains that, at the foot of the application, he wrote the signature "Antoine Pettigrew," on either side of the mark made by Pettigrew, who could not write. The most important findings of the jury are contained in their answers to question 15. These are to the effect that: (1.) Before the issuing of the policy sued on, the respondent company had, upon the same application, issued another payable to Antoine Pettigrew and his represen-

tatives; (2.) that Antoine Pettigrew and the appellant refused the first policy, having in lieu and place thereof exacted the policy sued on; and (3.) that it was the appellant, and not Antoine Pettigrew, who refused the first policy and exacted the second. In his evidence the appellant thus explains his reasons for declining the first policy—"Parce qu'elle était payable à Pettigrew ou ses héritiers"; and also his reason for exacting the second—"que si la compagnie défenderesse voulait émaner une police payable à moi directment, que j'en paierais les primes, autrement que je n'en voulais pas."

Their Lordships are of opinion, with the majority of the learned judges of the Supreme Court, that the findings of the jury are in themselves sufficient to establish that the appellant is not a lawful holder of the policy in question within the meaning of art. 2590 of the Code. The question remains, whether that clause of the policy which provides that the instrument shall become "incontestable" on the lapse of a period of a year or upwards, during which premiums are regularly paid, furnishes a good answer to the objection founded on the terms of the Code. Upon that point their Lordships concur in the opinion expressed by the majorities of the Supreme Court and of the Superior Court sitting in review. The rule of the Code appears to them to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties. Any other view would lead to the sanction of wager policies.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal. The appellant must pay to the respondent company their costs of this appeal.

Solicitors for appellant: *C. Russell & Co.*
Solicitors for respondents: *Capel-Cure & Ball.*

[PRIVY COUNCIL.]

J. C.*
1899
June 6;
July 8.

MONTREAL LITHOGRAPHING COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

SABISTON . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC (APPEAL SIDE).

Law of Quebec—Right to Injunction—Trade Name—Colourable Imitation of Name—What constitutes False Representation.

The appellant company, being the transferee of the assets and goodwill of the dissolved Sabiston Lithographic and Publishing Company, sued to restrain the respondent from carrying on business under the name of the Sabiston Lithographing and Publishing Company, or any other name so framed as to lead to the belief that his business was in succession to that of the dissolved company:—

Held, that the respondent had no right so to represent, but that there was no evidence that he had done so, and that the appellants were not entitled to an injunction against the mere use of the name.

APPEAL from a decree of the Court of Queen's Bench (Oct. 28, 1897) reversing a decree of the Superior Court at Montreal (March 5, 1897), and setting aside a writ of injunction which had been issued.

The facts are stated in the judgment of their Lordships.

The Superior Court held the appellants' title to the goodwill and assets in question to be proved, that the respondent shewed no right whatever to make use of the name of the dissolved company or of any name which would be a colourable imitation thereof, and that he had by such use prejudiced the rights of the appellants.

The Court of Queen's Bench held that the appellants did not derive by purchase from the dissolved company any right to use its corporate name (a right which could only be granted by the Crown) or to continue its business; that the respondent had not agreed expressly or tacitly to refrain from using its name or soliciting its customers.

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and LORD DAVEY.

The judgment was based upon the double ground—(1.) That shareholders could not "transfer to third parties the right to use the name of their company after it had ceased to exist. The grant of the Crown, being extinct, cannot be revived by the acts of the subjects." (2.) That the appellants could not derive from their purchase of goodwill any right to restrain the respondent from receiving and obtaining from the mails letters and other matters addressed to the old company and intended for it.

Special leave to appeal was granted on the submission by the appellants that an important point of law of general interest arose—whether the respondent was authorized by law fraudulently to use the name of a dissolved company or its colourable imitation in order to represent that he is, and that the appellants are not its lawful successors, and thereby divert to himself orders which were not intended for him, but were intended for the appellants.

Sir R. Reid, Q.C., and *Cowell*, for the appellants, contended that this judgment should be reversed. There was no finding in it that the respondent had shewn any right himself to use the name in question, nor was the finding of the lower Court reversed or in any way questioned to the effect that the respondent had by the user of the said name, or a colourable imitation thereof, acted in such way as would deceive the public into the belief that his business, and not that of the appellants, was the true successor of the business formerly carried on by the dissolved company. The evidence fully sustained the finding of the first Court. The colourable imitation could only have been resorted to with intent to deceive. It was on the face of it calculated and intended to deceive, and evidence was given by persons who had actually been deceived. A finding that the user was calculated to deceive was all that was necessary to support the injunction. Reference was made to *Trego* v. *Hunt* (1); and *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (2) was specially relied upon.

Blake, Q.C., and *Duclos*, for the respondent, were not heard.

(1) [1896] A. C. 7.

(2) [1899] A. C. 83.

J. C. 1899

MONTREAL LITHOGRAPHING COMPANY v. SABISTON.

1899. July 8. The judgment of their Lordships was delivered by

LORD DAVEY. In the year 1889 a company was incorporated under letters patent of the Province of Quebec with the name of the Sabiston Lithographic and Publishing Company. That company carried on business at the Gazette Building, Montreal, until April 13, 1896, when a winding-up order was made against it, and a liquidator was appointed. One Alexander Sabiston was the managing director or manager of the company until a short time before it went into liquidation.

On April 28, 1896, the assets of the Sabiston Company, including the goodwill, were sold by public auction to one Hyde, who forthwith transferred the same to two persons carrying on a similar business at Toronto under the name of the Toronto Lithographing Company. Those persons on the following September 30 registered the appellant company with the name of the Montreal Lithographing Company, Limited, and transferred to them the assets, including the goodwill, of the old company. It appears that the business continued to be carried on under the direction of the liquidator until the formation of the appellant company, and has since been carried on by the appellant company at the Gazette Building, Montreal.

On May 1, 1896, the respondent, who is a brother of Alexander Sabiston, signed a declaration that he intended to carry on business in Montreal as printer, lithographer, and publisher under the name of the Sabiston Lithographing and Publishing Company, and he has since carried on that business, with the assistance of his brother, at 457, St. Paul Street, Montreal.

On December 9, 1896, the appellants commenced the present action by petition, in which they alleged that the respondent was fraudulently and wrongfully carrying on business as printer, &c., under the name and style of the Sabiston Lithographing and Publishing Company, and was fraudulently leading the public to believe that the business carried on by him was that of the dissolved and liquidated company. The prayer of the petition was that a writ of injunction be issued to restrain the respondent from carrying on business under the

name Sabiston Lithographing and Publishing Company, or any other name so framed as to lead to the belief that the business carried on by the respondent is the same business as that heretofore carried on by the dissolved company, or that his business is the successor of that of the dissolved company.

De Lorimier J. in the Superior Court granted an injunction in the terms of the prayer of the petition. But that decree was reversed by the Court of Queen's Bench, and the present appeal is from the decree of the latter Court.

The judgment of the Court of Queen's Bench was delivered by Blanchet J., and proceeded on the grounds that the liquidator could not transfer the right to use the name of the dissolved company, which was a grant from the Crown, and the liquidator could only give the assets as he found them, and the pretended sale of the goodwill made by him, even judicially authorized, could not bind the shareholders, and could not transfer to the now appellants a right which had then no real and actual existence.

Their Lordships agree with the Court below that the appellants have no right to restrain the respondent from using the trade name under which he is carrying on his business, but they are not prepared to concur in all the reasons given by the learned judge for the judgment of the Court. They have not found it necessary to hear the respondent's counsel. Subject to this observation, they see no reason to doubt that it was competent for the liquidator to sell the goodwill of the old company together with its other assets. But the extent of the rights conferred by a transfer of a goodwill may depend upon circumstances. No doubt the appellant company could not acquire any corporate name except by grant from the Crown; but the promoters of the appellants might have applied for incorporation under the same name as the old company subject to any objection which might be urged by the respondent. As already stated, no such application was made. The facts are that for upwards of seven months the respondent carried on his business under the present name with the acquiescence of the liquidator of the old company and, until the present action was commenced, of the purchasers of its goodwill. There

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appears, indeed, to have been some correspondence with the solicitor of the liquidator in May, 1896, but it did not result in any proceedings being taken. The appellants, on the other hand, were incorporated and registered, and have since carried on their business under a quite different name, and do not allege any intention of using, and indeed have no right to use, the old company's name as their trade or firm name.

But the appellants have the right to describe themselves as the successors of the old company and as carrying on the same business, and they have availed themselves of that right in their trade circulars. The respondent, on the other hand, has no right to hold himself out as successor of the old company. But their Lordships cannot find on the evidence in the case that the respondent has done so. There is no representation to that effect in his trade circulars. The case of an order from customers named Pickford and Black was relied on by the appellants. But it is to be observed that the order was in the first instance received by the liquidator of the old company, who opened the letter containing it and forwarded it to the respondent, for whom he considered, though wrongly, it to be intended; and the customers, when made aware of the facts, elected to leave the order with the respondent. In the case of Norris, another customer, the respondent's manager himself caused the mistake to be communicated to the appellants, who got the order. Again, the respondent was not shewn to have been responsible for the terms of the entry in Lovell's Directory. It may have been a pardonable mistake by the compiler of the directory, who was not called by the appellants to clear up the matter. The evidence and argument all come back to the mere use of the name, and their Lordships have already expressed their opinion that the appellants are not entitled to an injunction on that ground alone.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed, and the appellants must pay the costs of it.

Solicitors for appellants: *Parker, Garrett & Holman.*
Solicitor for respondent: *S. V. Blake.*

[PRIVY COUNCIL.]

CORPORATION OF THE CITY OF VICTORIA . . . . . } DEFENDANTS; J. C.* 1899 June 6, 7, 8, 9.

AND

PATTERSON. . . . . PLAINTIFF.

CORPORATION OF THE CITY OF VICTORIA . . . . . } DEFENDANTS;

AND

LANG . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British Columbia Municipal Act, 55 Vict. c. 33—By-law — Liability of Corporation—Accident to Bridge under Corporate Control.

The appellant corporation having, under 55 Vict. c. 33, de facto taken over the care and control of a certain bridge; *held*, that their acts with regard to it were primâ facie competent corporate acts. It would lie on the corporation to shew clearly that any acts done by their officers under their direction were ultra vires and illegal, and that conclusion could not be reached merely by reason of their not having passed a by-law under 55 Vict. c. 33 actually vesting the bridge in them.

In an action to recover damages from them for a fatal accident caused by the breaking down of the said bridge over which a tramcar containing the deceased was running:—

Held, that the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke amply justified a verdict against them; and that the liability, if any, of the tram company for passing an extraordinarily heavy weight over it not having been before the jury, could not be raised in appeal.

APPEAL in the first case from a judgment of the Supreme Court (Nov. 4, 1897) dismissing an application by the appellants, that judgment should be entered for them or that there should be a new trial.

This was one of several actions brought against the appellants in respect of the collapse of Point Ellice Bridge, Victoria,

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and LORD DAVEY.

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on May 26, 1896; and the question in dispute was as to the liability under the circumstances and findings detailed in their Lordships' judgment of the appellant corporation for the consequences of that collapse.

Haldane, Q.C., and *J. D. Crawford*, for the appellants contended that they were not liable. As a municipal corporation they were the creation of statute, possessing such rights and duties as were created thereby. The municipal Acts were consolidated by 55 Vict. c. 33, which did not provide that the appellant corporation should be a highway authority or give it any ownership, power or control over roads, streets or bridges, within its territorial limits. Sect. 104 was referred to as enabling a by-law under which the appellants could assume the control of roads, streets, and bridges. No by-law was passed relating to the bridge in question, and no resolution was passed authorizing its repairs. Although certain alterations and repairs were made by them to the bridge, that was not sufficient to fix them with liability in this action. There was no deliberate and unequivocal corporate act. The liability of the corporation cannot be presumed from what was done by their servants, particularly as the bridge belonged to the provincial government and was a link in the provincial highway. Even if there were a statutory duty on the appellants to repair the bridge, a private person such as the respondent cannot maintain this action for its breach of duty, unless such right of action (which is not the case here) is expressly given by statute, as the appellants are a corporate public body and are therefore not liable for misfeasance. Reference was made to *Borough of Bathurst* v. *Macpherson* (1); *Cowley* v. *Newmarket Local Board* (2) [THE LORD CHANCELLOR referred to *Mackinnon* v. *Penson* (3)]; *Sanitary Commissioners of Gibraltar* v. *Orfila* (4); *Municipality of Pictou* v. *Geldert* (5); *Municipal Council of Sydney* v. *Bourke*. (6) The tramway company had acquired a statutory right to run their tramcars over the bridge before the limits of

(1) (1879) 4 App. Cas. 256.
(2) [1892] A. C. 345.
(3) (1854) 9 Ex. 609.
(4) (1890) 15 App. Cas. 400.
(5) [1893] A. C. 524.
(6) [1895] A. C. 433.

Victoria were so extended as to include it. Their user was under their own statutory powers, and they were responsible for any wrongful or negligent use thereof.

Blake, Q.C., and *D. G. Macdonell*, for the respondent were not heard.

Appeal in the second was from a judgment of the Supreme Court (April 1, 1898), dismissing an application to a similar effect as in the first case.

Taylor, Q.C., and *Cassidy*, for the appellant.

Blake, Q.C., and *D. G. Macdonell*, for the respondent, were not heard.

1899
June 9.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. These are two actions, one brought by Marion R. Patterson, the widow, and the administratrix of the goods of one James T. Patterson, deceased, against the Corporation of the City of Victoria, by reason of an accident that happened on May 26, 1896; the second action is by Martha Maria Lang, the widow, and administratrix of the estate and effects of John Lang, deceased.

Dealing first with the case of Patterson, the nature of the accident was that while a tramcar was passing over a bridge alleged to be under the care and control of the defendant corporation the bridge broke down, and the husband of the plaintiff, and other persons, were drowned. This is an action brought to recover damages in respect of the injury the plaintiff and her family sustained by the loss of her husband.

The first question that arises upon this record is, what was the cause of the accident which led to this calamity? Upon that question, subject to what their Lordships have to say hereafter in respect to the different classes of evidence upon which that question depends, it arose by reason of the breaking down of the bridge from its internal defects, coupled with the fact of the tramcar running over it at a point where, from natural decay, or other circumstances, to which their Lordships will have to call attention later, the bridge had

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become incapable of sustaining the weight to which it was subjected.

The question then arises, whether whoever is responsible for the condition of the bridge was guilty of any act of negligence, either by way of omission, or commission, which led to the accident? Some controversy has been raised at their Lordships' Bar with reference to the sufficiency of the evidence to establish the responsibility of any one. It is enough to say, in dealing with that part of the question, that there was evidence on both sides as to the condition of the bridge, and as to the circumstances under which the accident arose. Their Lordships do not regard it of very great importance to consider the particular portions of the evidence. The jury had before them the question of whether or not the proximate cause of the accident was the decay of the particular beam pointed out in the evidence; and whether or not the jury were accurate in their decision that the proximate cause of the accident was the decay, and the injury to that particular beam, it is immaterial to consider, because there was evidence from which the jury might fairly and properly arrive at that conclusion. They have arrived at it, and there is clearly no ground upon which that decision ought to be reviewed. It must be taken therefore that there was evidence to justify the jury in the conclusion at which they arrived.

The next question which arises is, who is responsible for the condition of that beam, which, for the rest of this judgment, is to be assumed to be satisfactorily ascertained to be the cause of the breaking of the beam at that point.

One question might have arisen in this case, a seriously important question, namely, whether, if the original construction of the bridge was such, and the pressure placed upon it by the tramway company was so great that, under any circumstances, independently of any decay, or misuse of the beam, to which their Lordships have referred, the weight placed upon it would have caused the destruction of the bridge. It might have been a very serious question whether or not the responsibility for passing that weight over the bridge at that point might not have rested upon those by whose act that unusual

and extraordinarily heavy weight was passed over, without casting any responsibility on those whose duty it was to maintain and repair the bridge.

Their Lordships are of opinion that no such question arises in this case, because the conduct of the trial was such that that question was never submitted to the jury, and was never raised in point of argument; and, if it had been, a totally different series of testimony and witnesses might have been properly called to determine that question. It would be almost beyond doubt that if such a question as that had been raised, evidence of a different character would have been produced. Persons sought to be incriminated by the imputation to them of negligently passing over that weight would probably have been called to shew that weights of a similar character had been repeatedly passed over the bridge. And indeed some evidence appears in one of the cases which will be referred to hereafter to shew that evidence of that sort was available. But it is enough to say, upon that part of the case, that when parties go before a jury to determine particular issues, and when, by their conduct, whatever the state of their pleadings may be, they leave aside one question altogether, and do not direct their adversary's attention to a point of fact which may be answered by evidence on the other side, it is too late after the verdict to raise that question again. And upon the barest principles of justice it would be improper to allow any such thing to be done, because it would be taking their adversaries by surprise; it would be raising new questions after the tribunal before whom such questions are properly decided had decided the case, when the opportunity of raising and deciding them has passed by. It is abundantly clear in the course of the trial here that no such question as that was ever presented to the jury; and it is, their Lordships think, the experience of every one familiar with causes tried before a jury, that no more inflexible rule has ever obtained in the Courts than that you shall not raise a question after a trial which has not been raised at the time, which question, if it had been raised, could have been answered by evidence on the other side.

The question, therefore, which their Lordships have to

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decide, must be considered to be independent of any such question as that. That question, if it is raised again, as it may be, would be a question to be determined quite irrespective of anything their Lordships have said in this judgment. The question here is to be determined upon the issues raised and argued, and decided before that jury.

The question that was raised is whether or not the persons, whoever they were (as to which more will be said hereafter), were responsible for the state of the bridge, and the condition to which the bridge was then reduced. The jury have answered certain questions put to them by the learned judge who tried the cause, and it would appear from the evidence, that the corporation (as to the responsibility of which more will be said hereafter, with reference to the legal position the corporation occupied) undoubtedly, from the year 1892 (this accident having happened in the year 1896), had the care, and conduct, and management of this bridge; that one of their officers, paid by them, and authorized by them, went to the bridge, and bored certain holes in the beam, and it is alleged, and found by the jury that this was the place at which the accident was caused, and that the boring was the proximate cause of the calamity which followed. It is unnecessary to go into detail upon the particular evidence given by the person so called; it is enough to say that there is certainly ground for the verdict of the jury that the proceedings then taken materially weakened the beam, which afterwards broke. There was the evidence, upon the cogency or force of which their Lordships have not to pronounce any opinion, that the boring of holes and leaving them so as to collect water, was calculated to rot this beam; that for a period of four years this beam was left in that condition, collecting water, and if the evidence is to be believed, diffusing a state of rottenness all through the beam. That act was done by an officer of the corporation, upon their direction, and paid for by them. That would, under ordinary circumstances, be ample evidence to justify the verdict which was ultimately found against the corporation.

But it is objected that although the corporation were, in fact, so far as a corporation can be, by its officers, and persons in

their employment, in physical possession of the bridge, yet the nature of the legislation in British Columbia is such that the bridge, although in possession of the same persons who were corporators, and professing to occupy the position of corporators, was not in point of law in possession of the corporation, but in possession of persons who were wrongly pretending to be the corporation, and that, therefore, so far as that abstract legal creature the corporation was concerned, the acts done were ultra vires, and, indeed, they were not corporate acts within the legal capacity of the corporation to commit.

That question depends upon the British Columbian legislation, and the British Columbian legislation, their Lordships assume now, by the admission of both parties, is of this character: that the roads and bridges are vested in the Dominion, or in the province, it is immaterial which, but in the constitution of the province they are left to be adopted or not by the particular municipalities which are from time to time created in the province. That, so far as the evidence is concerned, appears to have been the condition in which this bridge was at the time of the accident; that it was a bridge which at one time had belonged to, and been in the possession, and under the legal control of one set of authorities. It is alleged on the part of the plaintiff that it was adopted and taken over by the municipality, and they became responsible for the maintenance of it, and if negligence was committed in the charge of it, responsible for the damages such as are claimed in this action.

The question which appears to be sought to be argued before their Lordships is this: that as the general Act of Parliament, the Municipal Act, 1892 (55 Vict. c. 33), appears to assume that when the municipalities have got possession of, and have adopted, either the roads or the bridges, it simply gives them the power to make by-laws, a by-law actually vesting the bridge in the corporation was a necessary preliminary to treating their acts as corporate acts, and inasmuch as there was no by-law in evidence which, so to speak, vested the bridge in them, the corporation had not become the responsible authority.

Now there are two modes in which that matter can be

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treated. The first of them is this: that the Act of Parliament which gives the power, as it is said, to act by by-law, nowhere prescribes any particular form of adoption; and, so far as their Lordships have heard, there is no general Act of Parliament which provides that when a municipality is adopting a road or a bridge it has to go through any particular form; but the nature of the general statute referred to above is that when the municipality has adopted a bridge, the bridge so adopted comes under the jurisdiction of the municipality, and the municipality then is empowered to do the ordinary works which a municipality in other parts of the world does, make by-laws for the regulation of powers that it possesses so as to bind outside persons, and to inflict penalties for any nuisance committed on the highway, or for any injury done to the bridges, and so forth. Their Lordships are of opinion that there is nothing in that statute which prescribes any particular form of adoption. When the question arises whether a bridge or a road has been adopted or not, it must be treated like any other question which involves the necessity of proof of the authority to assume a jurisdiction. If the statute has not prescribed any form, any appropriate form which the municipality chooses to adopt for the purpose of investing itself with that authority would be sufficient.

Their Lordships find as a matter of legal inference from the facts found by the jury that the appellant corporation, from and after the year 1892, competently assumed, under the provisions of the Municipal Act, the maintenance, repair, and control of the Point Ellice Bridge in the interests of the community. It is, indeed, to be remarked that since this accident has taken place, that which purports to be a by-law of this same corporation, which is now setting up their inability to act in a corporate capacity at all in respect of this bridge, has been passed by them, and which purports to be, "Regulations for the working of street railways on and across the wooden pile bridge at or near point Ellice, in the city of Victoria, and for controlling the vehicular traffic on and across the said bridge." It recites that, "Whereas it is deemed necessary and requisite for the protection of the persons and property of the public

that the regulations hereinafter contained shall be made. Therefore the municipal council of the corporation of the city of Victoria enacts as follows: (1.) No car weighing with its passengers more than eight and one-half tons shall be allowed to be on or to cross the wooden pile bridge over the waters of the Victoria Arm at or near Point Ellice in the city of Victoria, and no such car shall be permitted or suffered to contain or to carry over the said bridge more than thirty passengers at any one time."

Their Lordships certainly in the face of that regulation purporting to be passed by this corporation, are somewhat surprised that the appellant corporation appearing here should argue that these acts which they are doing, purporting to regulate the traffic over this bridge, and purporting to exercise the authority of the municipal council in that respect given—that every one of those acts which they have done hitherto, and which they have done after the transaction into which their Lordships are now inquiring, were acts which they had no authority to do, and that they, as a corporation, are not persons acting at all, although they are purporting to act with the authority and under the sanction of the law, which only gives them the power to do it if they are a corporation in possession of and holding the authority over this bridge. However, of course, if they can succeed in establishing that proposition, it would be true to say that whatever might be the responsibility of the individuals who have been so acting without authority, and purporting both to raise money by rates, and purporting to sell some of the actual property in the bridge, whatever might be the individual liability of each of the persons doing or concurring in such illegal procedure, if it were illegal, the corporation, quâ corporation, would not be responsible, although the individual persons (corporators) might be in their individual capacity.

But their Lordships are entirely unable to accept any such proposition as having been made out here. Their Lordships are of opinion that the General Act, prescribing no particular form of adoption, is satisfied by what was done; that the fact that the corporation has taken into its hands and is now managing this bridge is ample to satisfy the statute. There is

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another proposition by which the same result would be arrived at. It is not denied that the corporation officers in the name of the corporation have been managing this bridge and taking care of it and repairing it, and, as it is said, selling the materials of it, ever since the year 1892. If this question of there being no adoption were to be relied upon in the face of the fact that for this period of years the municipality has been apparently conducting these operations, and exercising this authority, it would have been obviously a necessary part of the evidence put in on the part of the corporation to negative whatever was necessary to establish the authority to take possession of this bridge. Any tribunal would be probably guilty of very gross omission to do its duty if it did not assume from that condition of things that all these things were legally done. No Court ought to assume illegality; and where there is an amount of such action as there is here, taking possession and dealing with this matter by acts of ownership only consistent with the corporation being the legal authority, it certainly ought to have been put before the Court and jury that, if such a question was to be raised, the burden of proof was upon those persons who sought to shew that their acts were illegal and not justified by the course of law and administration in which they were then engaged. It is not necessary to rest their Lordships' decision upon that view, because the construction which their Lordships place upon the General Act and upon what has been done in respect of that General Act, is enough, for the decision of this case; but it is important to point out to the parties that where that condition of things which has been described exists, it would be for the corporation itself to shew that that, which was primâ facie their act, was not their act, by every species of evidence by which their authority could be negatived.

It is enough, therefore, to say that on either of these grounds it would be impossible to maintain that this was not an act within the power of the corporation to do, and their Lordships are of opinion that there was ample evidence that it did do the acts for which responsibility is insisted on against them.

The other case, which has been argued almost together with it, though argued in one sense separately, differs only in one

trifling respect, and that simply means that one of the witnesses called in the second case differs in his evidence from the evidence he gave on the first occasion. But that is a matter wholly immaterial. In each case the witness was before the jury. It was for the jury to consider, and, if his evidence was at all different, it was for the jury to weigh and value the amount of credit, or discredit that they would attach to the second version of his evidence by reason of the variation in that evidence from when he first gave it. But the jury have decided the question precisely almost in terms in the same way, and therefore the second case must follow the fate of the first.

Their Lordships are therefore of opinion that none of the points that have been made on the part of the appellant corporation are sustainable, and they will humbly recommend to Her Majesty that both these appeals should be dismissed with costs.

Solicitors for appellant: *Hubbard & Wheeler.*
Solicitor for both respondents: *S. V. Blake.*

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MADDEN AND ANOTHER (PLAINTIFFS) AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA (INTERVENANT) . . . . } APPELLANTS;

AND

NELSON AND FORT SHEPPARD RAILWAY COMPANY (DEFENDANTS) AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA (INTERVENANT) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Powers of Provincial Legislature—British Columbian Cattle Protection Acts, 1891, 1895.

The provision in the British Columbian Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is ultra vires of the provincial parliament.

Canadian Pacific Ry. Co. v. *Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, distinguished.

APPEAL from a decree of the Supreme Court (Aug. 19, 1897) reversing a decree of the county court for the district of Kootenay (Jan. 29, 1897) and entering judgment for the respondents, the railway company.

The action was brought to recover the value of two horses (one of them killed and the other injured) which had got on the railway of the respondent company by reason of there not being any fence on each side of the railway.

The plaintiffs relied upon the Cattle Protection Act, 1891, amended by ss. 2 and 3 of the Act of 1895. The defendants objected that, the railway having been declared by the Parliament of Canada to be a work for the general advantage of

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR EDWARD FRY, and SIR HENRY STRONG.

Canada, they were subject in respect thereof only to Dominion legislation, and were not subject to the Cattle Protection Act or any other Act of the legislature of British Columbia.

The First Court allowed this objection, but the Supreme Court overruled it, holding the Acts relied upon to be ultra vires of the provincial legislature so far as the respondent company was concerned.

Haldane, Q.C., and *Taylor, Q.C.*, for the appellants, contended that the Acts in question did not relate to any matter declared by s. 91 of the British North America Act, 1867, to be within the exclusive legislative authority of the Dominion. They related to property and civil rights within the province, and were therefore within s. 92, sub-s. 13. The specific civil rights within the province to which they related were those of cattle owners in respect of cattle killed or injured as therein mentioned upon a railway. The decision relied upon was that of *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1), decided since the judgment of the Supreme Court herein.

Blake, Q.C., and *Loehnis*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that in this case the judgment appealed from ought to be affirmed. The course of the argument has been rather to suggest that if there is no direct enactment in the statute (the Cattle Protection Act, 1891, 54 Vict. c. 1 (B.C.), as amended by the Cattle Protection Act, 1895, 58 Vict. c. 7 (B.C.))—the validity of which is in question—to create any erection or construction of the works of the railway that it would avoid the objection of the statute being ultra vires. But their Lordships are not disposed to yield to that suggestion, even if it were true to say that this statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do that indirectly which you

(1) [1899] A. C. 367

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are prohibited from doing directly. But it is an under-statement of the difficulties in the way of the appellants to speak of it as an indirect operation of the statute to direct that this company should erect fences and provide against the particular class of accident which happened in this case, because the provincial legislature that passed this enactment seem to have been under the impression that they were not proceeding indirectly at all—that they were proceeding directly, and the preamble of their statute points out what they were intending to do. That preamble recites: "And whereas railway companies incorporated under the authority of the Parliament of Canada, or declared by the said Parliament to be for the general advantage of Canada, or for the advantage of two or more of the provinces, do not recognise any obligation on their part to fence against such cattle: And whereas it is just that such railway companies should, in the absence of proper fences, be held responsible for cattle injured or killed on their railways by their engines or trains." In other words, the provincial legislature have pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly ultra vires.

Their Lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1), where it was decided that although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the

(1) [1899] A. C. 367.

railway company were not exempted from the municipal state of the law as it then existed—that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company unless they create such and such works upon their roadway. This is manifestly and clearly beyond the jurisdiction of the provincial legislature.

The only further observation their Lordships have to make is that these propositions are sufficient to dispose of this case, and that, so far as the judgment in the Court below is concerned, they do not propose to adopt in all respects, or to agree with some of, the remarks made as to the state of the common law, and as to how the common law would have existed without this legislation. Although it is unnecessary to consider that point, their Lordships are not to be taken as adopting the reasons given by the judges in the Court below upon the common law. The reasons given by their Lordships justify them in saying they will humbly advise Her Majesty that this appeal be dismissed. There will be no order as to costs.

Solicitors for appellants : *Gard, Hall & Rook.*
Solicitors for respondents : *Charles Russell & Co.*

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1899, will be as follows :—

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BANKRUPTCY — *Fraudulent Preference — Conveyance to make good Breaches of Trust—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

A trustee, who had committed breaches of trust and was insolvent, on the eve of his bankruptcy conveyed an estate to make good the breaches of trust, without any pressure or request by his cestuis que trust :—

Held, that there was no fraudulent preference within s. 48 of the Bankruptcy Act, 1883, the

BANKRUPTCY—*continued.*
debtor's object being to shield himself from the consequences of his breaches of trust.

The decision of the Court of Appeal (*New, Prance & Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19) affirmed. SHARP (OFFICIAL RECEIVER) *v.* JACKSON - - - **H. L. (E.) 419**

2. —— *Preference — Trust for Creditors — Right in Security — Pledge — Private Manager.*

By trust deed executed July, 1895, S., a farmer, conveyed his whole estate to M., "as trustee and in trust and as my commissioner (but hereinafter called trustee) for the uses, ends, and purposes after specified," "with full power to manage the farm until expiry or renunciation of the lease, to sell the stock, &c., to sue and defend actions, pay rent and wages, and out of the remainder pay the creditors" of S.; "or if the remainder was inadequate, to call for claims and divide the sums." S. was declared bankrupt July 10, 1896. M. claimed a preferential right to be paid a balance due to him in respect of his actings in the management of the farm. He alleged that at the date of the bankruptcy he held the whole estate in security and for payment of his advances, expenses, and remuneration as trustee, and claimed full payment of his debt. And in virtue of his having paid for the seed and labour of sowing and caring for the crop of 1896, he specially claimed to be preferred to the whole sum arising from the realization of the crops, or such part as would recoup him for his expenses, advances, and remuneration. The trustee rejected M.'s claim so far as it included law expenses after the date of the bankruptcy and other small sums, and under deduction of these sums the trustee admitted M.'s claim to be an ordinary debt, rejecting the debt altogether as a preferable one:—

Held, affirming the decision of the Second Division of the Court of Session, 25 R. 398, that M. had no right to a preferable claim, on the ground that he had never held the bankrupt's estate in security, and that the payments made for seed and labour did not entitle him to a preferable ranking. MESS *v.* HAY **H. L. (Sc.) 233**

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CHARITY—*Will—Failure of Gift—Bequest of Trust Funds to be applied "in Grants for or towards the Purchase of Advowsons or Presentations."*

A bequest to trustees to expend the income or any portion of the trust funds "in grants for or towards the purchase of advowsons or presentations" is not a good charitable bequest.

A testator by his will declared that his residuary estate or so much thereof as should be legally applicable to charitable purposes should be transferred by his general trustees to special trustees in trust to apply the income or any portion of the capital "in grants for or towards the purchase of advowsons or presentations, or in creating or contributing to the erection, improvement or endowment of churches, chapels, or schools, or in paying or contributing to the salaries or income of rectors, vicars or incumbents, masters or teachers"; but upon certain conditions. The conditions were framed with a view to the promotion of "true Protestant and Church of England principles as held by those of her divines, clergy, and members who are distinguished as Evangelical," and though applicable to the other purposes were not applicable to the purchase of advowsons or presentations:—

Held, that since upon the true construction of the will no trust, charitable or other, which the Court could execute or control was annexed to the advowsons or presentations for the purchase of which the trustees had power to make grants, and there was no general trust for charity binding the whole fund, the whole gift failed and the residuary estate was undisposed of.

The decision of the Court of Appeal, *In re Hunter, Hood* v. *Attorney-General*, [1897] 2 Ch. 105, reversed and the decision of Romer J., [1897] 1 Ch. 518, restored. HUNTER *v.* ATTORNEY-GENERAL AND HOOD - - **H. L. (E.) 309**

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CONTEMPT OF COURT — *Newspaper — Innocent Loan of Paper containing Scandalous Matter respecting a Court—Committing Judge ordered to pay Costs.*

Contempt of Court may be committed by publication of scandalous matter respecting the Court after adjudication as well as pending a case before it. In England committals for such contempts have become obsolete; in small colonies consisting principally of coloured populations they may still be necessary in proper cases:—

But *held*, that where the appellant was neither printer nor publisher nor writer of such scandalous matter, but had innocently lent the paper containing it to a friend without knowledge of its contents, he was neither constructively nor necessarily guilty of contempt of Court, and that the judge who committed him must pay the costs of appeal to Her Majesty in Council. MCLEOD *v.* ST. AUBYN - - - - **P. C. 549**

CONTRACT — *Agreement — Finality of Audit — Charges of Fraud—Costs.*

The appellant advanced 15,000*l.* to the respondent, to be used in the business of the respondent for five years. In return for the advance the appellant was to receive interest and 37½ per cent. of the profits of the respondent's business. The contract stipulated that there should be an annual audit of the respondent's business by the firm of M. & Co., accountants, and that their certificate as to the profits should be binding on both parties. For four years the respondent's books were audited by G., a member of the firm of M. & Co. Subsequently the appellant raised this action against the respondent for a judicial account on the ground that the audits had not been in terms of the agreement in respect that the auditor did not know that his estimate of the profits was to be binding on the appellant and respondent. G. swore in his evidence that he did not know of this agreement, and that if he had he would have made out the account in a somewhat different form:—

Held, reversing the decision of the First Division of the Court of Session, (1898) 25 R. 661, that there must be a new account taken, the auditor being unaware that his audit was to be final between the parties. TEACHER *v.* CALDER **H. L. (Sc.) 451**

CONTRACT—*continued.*

—— Effect of company's adoption of contract made before its formation—Payment of shares in cash—Set-off - - 263
See PRIVY COUNCIL APPEALS. 17.

—— Ultra vires—Effect of consent judgment—Terms on which contract will be set aside - - - - 114
See PRIVY COUNCIL APPEALS. 5.

CORPORATION—*Borough Fund—Licensing Appeals—Appeal against Refusal of Licence—Payment of Costs of Chief Constable — Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140, *sub-ss.* 1–3, *ss.* 141–143, 190, 191, *5th Sched. Part II. clause* 5 (*d*), *clause* 12—*Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 2.

A municipal corporation cannot, where there is no surplus of the borough fund, legally pay thereout costs incurred by the chief constable in opposing by direction of the council appeals against the refusal of justices to renew the licences of publicans.

Query, whether if there be a surplus it can legally be applied to payment of such costs.

The decision of the Court of Appeal, [1898] 1 Q. B. 604, affirmed. TYNEMOUTH CORPORATION *v.* ATTORNEY-GENERAL - - H. L. (E.) 293

—— Liability of—Accident to bridge under corporate control - - - 615
See PRIVY COUNCIL APPEALS. 7.

—— Municipal Courts—Jurisdiction of—Act of State—Concessions granted before cession—Rights after annexation—Crown liabilities - - - - 572
See PRIVY COUNCIL APPEALS. 13.

—— Service of writ—Foreign corporation carrying on business in England—Agent 431
See PRACTICE. 2.

—— Taxation — Liability — Municipal Code of Quebec - - - - 288
See PRIVY COUNCIL APPEALS. 11.

COSTS—Agreement—Finality of audit—Charges of fraud - - - - 451
See CONTRACT.

—— Chief constable—Appeal against refusal of licence—Borough fund - - 293
See CORPORATION.

—— Newspaper — Innocent loan of paper containing scandalous matter respecting a Court — Committing judge ordered to pay costs - - - - 549
See CONTEMPT OF COURT.

—— Opposing bill in Parliament — Burgh — Rates—Ultra vires - - - 508
See SCOTTISH LAW. 1.

COUNTY COURT — *Bankruptcy — Jurisdiction — Order made in exercise of Bankruptcy Jurisdiction—Certiorari.*

Certiorari does not lie to bring up an order of a county court judge made when exercising bankruptcy jurisdiction.

The decision of the Court of Appeal, [1898] 2 Q. B. 680, affirmed. SKINNER *v.* NORTHALLERTON COUNTY COURT JUDGE - H. L. (E.) 439

COVENANT — "Discontinuance" of licence — Public-house—Construction of lease 442
See LANDLORD AND TENANT.

CREDITORS — Trust for—Right in security — Pledge—Preference—Private manager
See BANKRUPTCY. 2. 233

CRIMINAL LAW — Jury — Trial at Gibraltar should be by - - - 392
See PRIVY COUNCIL APPEALS. 14.

CROWN — Act of State — Concessions granted before cession—Rights after annexation
See PRIVY COUNCIL APPEALS. 13. 572

CROWN LANDS—Laws of New South Wales 90, 408
See PRIVY COUNCIL APPEALS. 18, 19.

CROWN SUITS ACT—Company—Executor de son tort—Liability to pay probate duty
See REVENUE. 3. 62

CUSTOMER—Effect of crediting, with amount of cheque deposited—Effect of drawee bank certifying cheque—Usage - 281
See PRIVY COUNCIL APPEALS. 26.

DAMAGES — Irrigation—Land slides—Liability—Injunction - - - 535
See PRIVY COUNCIL APPEALS. 9.

—— Support—Right to lateral—Adjacent lands—Escape of pitch—Injunction - 594
See PRIVY COUNCIL APPEALS. 27.

DECEPTION—Trade name—Similarity of name—Company - - - - 83
See TRADE NAME. 1.

DELAY—Probate duty paid under protest—Application for refund - - 251
See PRIVY COUNCIL APPEALS. 24.

DELIVERY—Time allowed for taking—Charge for use of sidings—Jurisdiction of arbitrator - - - - 133
See RAILWAY. 2.

DELUSIONS—Will—Relevancy—Capacity 1
See WILL. 1.

DISCONTINUANCE — Licence — Public-house — Lease—Covenant - - - 442
See LANDLORD AND TENANT.

DISEASES OF ANIMALS—Markets and fairs—By-laws—Ultra vires - - 470
See MARKET.

DISTRIBUTION — Postponed period of — Conditional institution—Succession — Vesting
See SCOTTISH LAW. 518

DIVORCE—*Irish Divorce Bill—Evidence taken in India.*

Evidence taken in India on commission, and received and acted on by the Queen's Bench Division of the High Court of Justice in Ireland, admitted to be used on the second reading of an Irish divorce bill. JONES' DIVORCE BILL H. L. (D.) 348

DOLUS MALUS—Priority of unregistered transfer —Registered transfer set aside—Law of Natal - - - - - 374
See PRIVY COUNCIL APPEALS. 15.

DUTY—Public revenue.
See REVENUE.

ECCLESIASTICAL LAW — Advowson — Will—Failure of gift—Bequest of trust funds to be applied for or towards purchase of advowsons or presentations - 309
See CHARITY.

EQUITABLE JURISDICTION — Underground trespass — Fraud — Statute of Limitations - - - - - - 351
See PRIVY COUNCIL APPEALS. 22.

EQUITY OF REDEMPTION — Estate duty — Mortgage of settled property—Annuity
See REVENUE. 2. 198

ESTATE DUTY—Interest ceasing on death—Surrender of life interest to remainderman - - - - - - 53
See REVENUE. 1.

—— Mortgage of settled property—Equity of redemption — Annuity — Value of property passing on death of tenant for life
See REVENUE. 2. 198

ESTOPPEL—Contract by company ultra vires—Effect of consent judgment - 114
See PRIVY COUNCIL APPEALS. 5.

EVIDENCE—Irish divorce bill—Evidence taken in India - - - - - 348
See DIVORCE.

—— Will — Execution — Denial by attesting witness - - - - - 401
See PRIVY COUNCIL APPEALS. 1.

EXECUTION — Will — Evidence — Denial by attesting witness - - - - 401
See PRIVY COUNCIL APPEALS. 1.

EXECUTOR DE SON TORT — Testator foreign subject domiciled abroad—Liability to pay probate duty - - - - 62
See REVENUE. 3.

EXTINGUISHMENT — Tolls—Prescriptive right—Extinguishment of old franchise by statutes - - - - - 41
See TOLLS. 1.

FALSE REPRESENTATION—What constitutes—Trade name—Colourable imitation of name—Right to injunction - 610
See PRIVY COUNCIL APPEALS. 12.

FENCES—British Columbian Cattle Protection Acts - - - - - - 626
See PRIVY COUNCIL APPEALS. 6.

FINANCE ACT—Estate duty - 53, 198
See REVENUE. 1, 2.

FOREIGN CORPORATION—Carrying on business in England—Service of writ—Agent
See PRACTICE. 2. 431

FOREIGNER—Testator foreign subject domiciled abroad — Company—Executor de son tort—Liability to pay probate duty 62
See REVENUE. 3.

FRAUD—Charges of — Costs — Agreement — Finality of audit - - - 451
See CONTRACT.

FRAUD—*continued.*
—— Underground trespass — Equitable jurisdiction—Statute of Limitations - 351
See PRIVY COUNCIL APPEALS. 22.

FRAUDULENT PREFERENCE—Conveyance to make good breaches of trust - 419
See BANKRUPTCY. 1.

GAMING—*Place used for Betting*—"*Place kept and used*"—*Inclosure on Racecourse*—*Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

Adjacent to a racecourse there was an uncovered inclosure of about a quarter of an acre, fenced in by iron rails, to which when race-meetings were held the public were admitted by the owners of the racecourse on payment of an entrance fee. Among the five hundred to two thousand persons so admitted were always one or two hundred professional bookmakers, and most of the persons admitted, other than the bookmakers, went for the purpose of backing horses with the bookmakers, but some did not bet at all. The bookmakers, who were accompanied by their clerks, did not use any apparatus such as a desk, stool, umbrella, or tent, but any particular bookmaker was usually to be found in or near the same part of the inclosure, calling out the odds to attract backers. In some cases the backers were required by the bookmakers to deposit their stakes; in others credit was allowed. This use of the inclosure was known to and permitted by the owners thereof:—

Held, affirming the decision of the Court of Appeal, [1897] 2 Q. B. 242 (Lords Hobhouse and Davey dissenting), that the inclosure so used was not "a place opened, kept or used" for the purposes prohibited by the Betting Act, 1853.

Held contra (by Lords Hobhouse and Davey), that the inclosure was a "place kept and used" by the owners for the purpose of the bookmakers who used it betting with persons resorting thereto, and (by Lord Davey) for the purpose also of the bookmakers receiving deposits of money on bets, and that the case fell within the Act.

Hawke v. *Dunn*, [1897] 1 Q. B. 579, overruled. POWELL *v.* KEMPTON PARK RACECOURSE Co. - - - - H. L. (E.) 143

GAS—Right to stop supply of gas generally—Law of Canada - - - 589
See PRIVY COUNCIL APPEALS. 2.

GIBRALTAR—Laws of - - - 392
See PRIVY COUNCIL APPEALS. 14.

GLASS-HOUSES — Rating — Market garden — "Agricultural land" - - 448
See RATES.

GUARANTEE — Bond — Construction — Recital and condition - - - 396
See PRIVY COUNCIL APPEALS. 20.

HOUSE OF LORDS—Appeal to, from interlocutory order of Court of Appeal in Ireland — Jurisdiction - - - 435
See PRACTICE. 1.

INCLOSURE — On racecourse — Place used for betting - - - - 143
See GAMING.

INCOME TAX—Taxable income—Mortgages—Land and Income Tax Assessment Act
See PRIVY COUNCIL APPEALS. 21. 254

INDIA—Evidence taken in—Irish Divorce Bill
See DIVORCE. 348

INJUNCTION—Interim—Appeal from—Trespass—New South Wales Mining on Private Lands Act - - - 258
See PRIVY COUNCIL APPEALS. 23.

—— Support—Right of lateral—Adjacent lands—Escape of pitch—Damages - 594
See PRIVY COUNCIL APPEALS. 27.

—— Trade name—Colourable imitation of name—What constitutes false representation
See PRIVY COUNCIL APPEALS. 12. 610

—— Water—Irrigation—Land slides—Liability for damages - - - 535
See PRIVY COUNCIL APPEALS. 9.

INN—Lease—Covenant, construction of—"Discontinuance" of licence - - 442
See LANDLORD AND TENANT.

INSANE DELUSIONS—Will—Relevancy—Capacity - - - - - - 1
See WILL. 1.

INSURANCE, LIFE—Validity of life policy—Lawful holder—Laws of Canada 604
See PRIVY COUNCIL APPEALS. 3.

INTERDICT—Descriptive name - - 326
See TRADE NAME. 2.

INTERIM INJUNCTION—Appeal from—Trespass — New South Wales Mining on Private Lands Act - - 258
See PRIVY COUNCIL APPEALS. 23.

INTERLOCUTORY ORDER—Appeal to House of Lords from Court of Appeal in Ireland—Jurisdiction - - - - 435
See PRACTICE. 1.

INTESTACY—Partial—Terce, jus relictæ, and legitim—Will—Provision for widow
See SCOTTISH LAW. 3. 495

IRELAND—Appeal to House of Lords from interlocutory order of Court of Appeal in—Jurisdiction - - - - 435
See PRACTICE. 1.

IRISH DIVORCE BILL — Evidence taken in India - - - - 348
See DIVORCE.

IRRIGATION—Land slides — Injunction—Liability for damages - - - 535
See PRIVY COUNCIL APPEALS. 9.

ISSUE—Will—Succession—Vesting - 15
See WILL. 2.

JURISDICTION—Appeal—Right of — Laws of Natal—Licensing officer - - 246
See PRIVY COUNCIL APPEALS. 16.

—— Appeal to House of Lords from interlocutory order of Court of Appeal in Ireland 435
See PRACTICE. 1.

—— Arbitration—Charge for use of sidings—Condition precedent—Difference before action brought - - - 79
See RAILWAY. 1.

JURISDICTION—*continued.*

—— Arbitrator—Charge for use of sidings—Time allowed for taking delivery 133
See RAILWAY. 2.

—— Certiorari—Order made in exercise of bankruptcy jurisdiction - - - 439
See COUNTY COURT.

—— Equitable—Statute of Limitations—Underground trespass—Fraud - - 351
See PRIVY COUNCIL APPEALS. 22.

—— Municipal courts — Act of State—Concessions granted before cession — Rights after annexation - - - 572
See PRIVY COUNCIL APPEALS. 13.

—— Service of writ—Foreign corporation carrying on business in England—Agent - 431
See PRACTICE. 2.

JURY—Trial at Gibraltar should be by - 392
See PRIVY COUNCIL APPEALS. 14.

LACHES — Underground trespass — Equitable jurisdiction—Fraud—Statute of Limitations - - - - 351
See PRIVY COUNCIL APPEALS. 22.

LANDLORD AND TENANT—*Lease—Covenant, Construction of—"Discontinuance" of Licence—Public-house.*

The lessee of a public-house covenanted to conduct the business so as to afford no ground for "discontinuing the licence":—

Held, that read with the context "discontinuing" meant not refusing to renew but forfeiting the licence.

The decision of the Court of Appeal, [1898] 1 Q. B. 716, affirmed. BRYANT *v.* HANCOCK & Co. H. L. (E.) 442

—— Gold lease application—Appeal from interim injunction — Trespass — New South Wales Mining on Private Lands Act
See PRIVY COUNCIL APPEALS. 23. 258

LEASE.
See LANDLORD AND TENANT.

LEASEHOLD AREA—Crown Lands Acts—Resumed area — Laws of New South Wales - - - - 90
See PRIVY COUNCIL APPEALS. 19.

LICENCE—"Discontinuance" of—Public-house—Lease—Covenant - - 442
See LANDLORD AND TENANT.

—— Licensing Acts.
See LICENSING ACTS.

LICENSING ACTS—*Licence—"Off Licence"—Order sanctioning Removal—Application for New Licence—Notice of Application—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.

The holder of an "off licence" for the sale of beer, wine and spirits in respect of certain premises applied at the general annual licensing meeting for a renewal of that licence. He also applied for a new licence of a similar description in respect of other premises, having given the notices requisite in applications for new licences, but not those requisite in applications for orders for removal. The licensing justices granted the application for the new licence on condition that

LICENSING ACTS—*continued.*
he gave up the licence for the first-mentioned premises and ceased forthwith to carry on the sale of beer, wine and spirits there. The applicant agreed to do this and the new licence was granted:—
Held, that this was neither in form nor in substance an order sanctioning the removal of a licence, and that the justices had an absolute discretion to grant the new licence.
The decisions of the Queen's Bench Division and Court of Appeal (*Reg.* v. *Thornton, Ex parte E. Lacon & Co., Limited*, [1897] 2 Q. B. 308; [1898] 1 Q. B. 334) reversed. LACEBY *v.* E. LACON & Co. - - - H. L. (E.) 222

—— Costs of chief constable—Payment of—Appeal against refusal of licence—Borough fund - - - - - 293
See CORPORATION.

—— Natal—Laws of—Licensing officer—Right of appeal — Jurisdiction of Supreme Court - - - - 246
See PRIVY COUNCIL APPEALS. 16.

LIFE INSURANCE—Validity of life policy—Lawful holder—Law of Canada - 604
See PRIVY COUNCIL APPEALS. 3.

LIMITATIONS, STATUTE OF—Equitable jurisdiction—Underground trespass—Fraud—Laches - - - - 351
See PRIVY COUNCIL APPEALS. 22.

LUNACY—Will—Relevancy—Capacity—Insane delusions - - - - 1
See WILL. 1.

MANAGER — Preference — Private manager — Pledge—Trust for creditors—Right in security - - - - 233
See BANKRUPTCY. 2.

MARKET—*By-laws—Ultra Vires—Markets and Fairs Clauses Act*, 1847 (10 & 11 *Vict. c.* 14), *s.* 42—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *s.* 32, *sub-s.* 2.
The Diseases of Animals Act, 1894, s. 32, sub-s. 2, incorporated with the said Act the Markets and Fairs Clauses Act, 1847, and s. 42 of the latter Act provides that the undertakers (authorized by the special Act to regulate a market or fair) may, from time to time, make such by-laws as they think fit (inter alia) "For regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein; and for preventing nuisances or obstructions therein, or in the immediate approaches thereto."
A local authority purporting to act in the exercise of the powers of the above Acts made a by-law to the effect that sale-rings at a public market belonging to it should not "be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying":—
Held, affirming the decision of the First Division of the Court of Session, (1899) 1 F. 665 (Lord Shand dissenting), that the by-law was not ultra vires. SCOTT *v.* GLASGOW CORPORATION H. L. (Sc.) 470

MARKET—*continued.*
—— Market garden—Rating—Glass-houses—"Agricultural land" - - 448
See RATES.

MINES—British Columbia Coal Mines Regulations — Naturalization and aliens — Chinamen - - - - 580
See PRIVY COUNCIL APPEALS. 8.

—— Gold lease application—Appeal from interim injunction — Trespass — New South Wales Mining on Private Lands Act
See PRIVY COUNCIL APPEALS. 23. 258

MISJOINDER—Parties—Practice - - 114
See PRIVY COUNCIL APPEALS. 5.

MOROCCO—Consular Court—Trial at Gibraltar should be by jury - - - 392
See PRIVY COUNCIL APPEALS. 14.

MORTGAGE—Estate duty—Mortgage of settled property—Equity of redemption—Annuity - - - - 198
See REVENUE. 2.

—— Taxable income—Land and Income Tax Assessment Act - - - 254
See PRIVY COUNCIL APPEALS. 21.

MUNICIPAL CODE OF QUEBEC—Art. 712, sub-s. 3 — Corporation — Liability to taxation - - - - 288
See PRIVY COUNCIL APPEALS. 11.

MUNICIPAL CORPORATION.
See CORPORATION.

NAME—Trade name.
See TRADE NAME.

NATAL—Laws of - - - 246, 374
See PRIVY COUNCIL APPEALS. 15, 16.

NATURALIZATION—Aliens and—Chinamen—British Columbia Coal Mines Regulations - - - - - 580
See PRIVY COUNCIL APPEALS. 8.

NEW SOUTH WALES—Laws of 90, 251, 254, 258, 263, 351, 396, 408
See PRIVY COUNCIL APPEALS. 17—24.

NEW ZEALAND—Laws of - - - 99
See PRIVY COUNCIL APPEALS. 25.

NEWFOUNDLAND—Laws of - - 281
See PRIVY COUNCIL APPEALS. 26.

NEWSPAPER—Innocent loan of paper containing scandalous matter respecting a Court—Committing judge ordered to pay costs - - - - 549
See CONTEMPT OF COURT.

NON-USER — Registration — Expunging — Non-user and no bonâ fide intention to use
See TRADE-MARK. 428

NOTICE—Application for new licence—"Off licence"—Order sanctioning removal
See LICENSING ACTS. 222

OFF LICENCE—Order sanctioning removal—Notice of application for new licence
See LICENSING ACTS. 222

PARTIES—Misjoinder—Practice - - 114
See PRIVY COUNCIL APPEALS. 5.

PATENT—*Prolongation—Petition for—Novelty consisting in the Combination—Absence of unusual Merit—Losses resulting from want of Business Skill.*

Where letters patent had been granted for "improvements in steam generators," and it was shewn that the invention consisted of the combination of various parts all or most of which were admittedly not new at the date of the letters patent; an extension was refused in the absence of evidence that the invention was of unusual merit.

Where patentees had incurred losses, these cannot be regarded as evidence of inadequate remuneration if attributable to unskilfulness in conducting their business. *In re* THORNYCROFT'S PATENT - - - - - P. C. 415

PAYMENT—Of shares in cash—Set-off—Effect of company's adoption of contract made before its formation - - 263
See PRIVY COUNCIL APPEALS. 17.

PENALTY—Company—Executor de son tort—Liability to pay probate duty - 62
See REVENUE. 3.

PETITION — Patent — Prolongation — Novelty consisting in the combination—Absence of unusual merit - - - 415
See PATENT.

PITCH—Escape of—Adjacent lands—Right to lateral support—Injunction—Damages
See PRIVY COUNCIL APPEALS. 27. 594

PLACE—Used for betting—Inclosure on race-course - - - - 143
See GAMING.

PLEDGE—Preference—Private manager—Trust for creditors—Right in security - 233
See BANKRUPTCY. 2.

POLICE—Chief constable—Payment of costs of —Licensing appeals—Borough fund
See CORPORATION. 293

POLICY—Validity of life policy—Lawful holder —Law of Canada - - - 604
See PRIVY COUNCIL APPEALS. 3.

PRACTICE—*Appeal—Jurisdiction—Appeal to House of Lords from Interlocutory Order of Court of Appeal in Ireland—Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *ss.* 3, 12—*Supreme Court of Judicature Act (Ireland)*, 1877 (40 & 41 *Vict. c.* 57), *s.* 86.

No appeal lies to the House of Lords from an interlocutory order of the Queen's Bench Division in Ireland, or from an order on appeal therefrom made by the Court of Appeal in Ireland. EARL OF GOSFORD *v.* IRISH LAND COMMISSION H. L. (I.) 435

2. —— *Service of Writ—Foreign Corporation carrying on Business in England—Agent—Officer—Admiralty—Jurisdiction—Rules of Supreme Court, Order* IX., *s.* 8.

A foreign corporation which does business in England in such a way as to be resident here may be sued here, and the writ may be served on its officer here.

PRACTICE—*continued.*

The decision of the Court of Appeal, [1899] P. 1, affirmed. LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE *v.* THOMAS LAW & CO. LA "BOURGOGNE" - - - - H. L. (E.) 431

—— Appeal — Right of — Laws of Natal — Licensing officer—Jurisdiction of Supreme Court - - - 246
See PRIVY COUNCIL APPEALS. 16.

—— Appeal from interim injunction—Trespass —New South Wales Mining on Private Lands Act - - - - 258
See PRIVY COUNCIL APPEALS. 23.

—— Evidence taken in India—Irish Divorce Bill - - - - - 348
See DIVORCE.

—— New trial—Motion for—Legatee preparing will in his own favour—Findings of jury - - - - - 563
See PROBATE.

—— Parties—Misjoinder - - - 114
See PRIVY COUNCIL APPEALS. 5.

—— Trial at Gibraltar should be by jury 392
See PRIVY COUNCIL APPEALS. 14.

PREFERENCE — Fraudulent — Conveyance to make good breaches of trust - 419
See BANKRUPTCY. 1.

—— Private manager — Trust for creditors— Right in security - - - 233
See BANKRUPTCY. 2.

PRESCRIPTION —Tolls —Prescriptive right — Extinguishment of old franchise by statutes - - - - 41
See TOLLS.

PRESENTATION—Bequest of trust funds to be applied for or towards purchase of advowsons or—Failure of gift - 309
See CHARITY.

PRIORITY—Dolus malus—Unregistered transfer —Registered transfer set aside—Law of Natal - - - — 374
See PRIVY COUNCIL APPEALS. 15.

PRIVY COUNCIL—Railway Committee of Privy Council—Canada Railway Act—Construction - - - - 275
See PRIVY COUNCIL APPEALS. 4.

PRIVY COUNCIL APPEALS—BERMUDA—*Will —Evidence of Execution—Denial by Attesting Witness—Testamentary Capacity.*

Case in which probate of a will which had been originally granted on the evidence of the two attesting witnesses was confirmed, notwithstanding that one of them retracted his evidence and in effect swore to the signatures of testator and witnesses having been forged, and the other witness was not called. In the circumstances, the later evidence of the one was held to be incredible, and the absence of the other to be satisfactorily explained.

Testamentary capacity is not disproved by evidence of the testator's eccentric acts and conduct. PILKINGTON *v.* GRAY - - P. C. 401

2. —— **CANADA**—*Gas—Right to stop Supply of Gas generally—Canada Act* (12 *Vict. c.* 183),

s. 20—*Construction—Gasworks Clauses (Imperial) Act*, 1847 (10 & 11 *Vict. c.* 15).

Held, that, by the true construction of s. 20 of the Canada Act (12 Vict. c. 183), borrowed from the Gasworks Clauses Act, 1847 (Imperial Parliament), the appellant company is authorized to cease supplying the respondent with gas at any of his houses on his neglect to pay its bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be implied. MONTREAL GAS COMPANY *v.* CADIEUX P. C. 589

3. —— *Insurance, Life—Validity of Life Policy—Lawful Holder—Civil Code of Lower Canada, Art.* 2590.

In an action on a policy of life insurance :—

Held, that the plaintiff was not a lawful holder. As "the protector of the deceased whenever he stood in need of protection" he had not an insurable interest in his life within the meaning of art. 2590 of the Civil Code of Lower Canada :

Held, further, that a condition in the policy that the same should on the lapse of a year or upwards during which premiums have been regularly paid become incontestable is no answer to an objection founded on the terms of the Code. ANCTIL *v.* MANUFACTURERS' LIFE INSURANCE COMPANY - - - - P. C. 604

4. —— *Railway Committee of Privy Council—Canada Railway Act* (51 *Vict. c.* 29), *s.* 262, *sub-ss.* 3, 4—*Construction.*

Held, that under the true construction of the Railway Act (Canada), 51 Vict. c. 29, the power conferred by sub-s. 4 of s. 262 upon the Railway Committee of the Privy Council to exonerate a railway company during a specified portion of the year from the duty of filling certain spaces specified in sub-s. 4, did not apply to the duty imposed by sub-s. 3 of filling certain other spaces specified by sub-s. 3. Such extension of power was not authorized by the grammatical construction of the sub-sections, nor rendered imperative by the context. GRAND TRUNK RAILWAY COMPANY OF CANADA *v.* WASHINGTON - P. C. 275

5. —— *Railway Company—Contract by Company ultra vires—Effect of Consent Judgment—Estoppel—Terms on which Contract will be Set Aside—Relief—Parties—Misjoinder.*

Where by contract, ex facie legal and regular, the appellant company purported to incur liability to the respondent for railway construction in an amount which was in reality calculated to cover the amount of bonus and of price of issued shares payable by agreement between the respondent and all the shareholders of the company irrespective of either actual or estimated cost of construction :—

Held, that the contract was ultra vires of the company :

Held, further, that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of ultra vires not having been raised either in the pleadings or on the facts

stated, was of no greater validity than the contract.

In a suit by the company to set aside the contract and judgment, *held*, that they must be set aside on terms which were consented to of paying to the respondent the balance due to him for construction on a quantum meruit, securing the amount thereof by bonds of the company if and when issued, the whole to be taken by him subject to first and other charges in favour of sub-contractors and banks in advance to them who had acted on the faith of the judgment to which they were not parties without notice of the illegalities of the contract.

The company having joined some of their bondholders and shareholders as co-plaintiffs, raising questions affecting them individually, *held*, that the action of the Court should be confined to issues between the company and the defendants. GREAT NORTH-WEST CENTRAL RAILWAY *v.* CHARLEBOIS - - P. C. 114

6. —— *British Columbia—Cattle—Powers of Provincial Legislature—Ultra Vires—British Columbian Cattle Protection Acts*, 1891, 1895 (54 *Vict. c.* 1 ; 58 *Vict. c.* 7).

The provision in the British Columbian Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is ultra vires of the provincial parliament.

Canadian Pacific Ry. Co. v. *Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, distinguished. MADDEN *v* NELSON AND FORT SHEPPARD RAILWAY COMPANY. P. C. 626

7. —— *British Columbia—Corporation—Liability of—Accident to Bridge under Corporate Control—By-law—British Columbia Municipal Act*, 1892 (55 *Vict. c.* 33).

The appellant corporation having, under 55 Vict. c. 33, de facto taken over the care and control of a certain bridge ; *held*, that their acts with regard to it were prima facie competent corporate acts. It would lie on the corporation to shew clearly that any acts done by their officers under their direction were ultra vires and illegal, and that conclusion could not be reached merely by reason of their not having passed a by-law under 55 Vict. c. 33 actually vesting the bridge in them.

In an action to recover damages from them for a fatal accident caused by the breaking down of the said bridge over which a tramcar containing the deceased was running :—

Held, that the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke amply justified a verdict against them ; and that the liability, if any, of the tram company for passing an extraordinarily heavy weight over it not having been before the jury, could not be raised in appeal. VICTORIA CORPORATION *v.* PATTERSON. SAME *v.* LANG - - - - - P. C. 615

8. —— *British Columbia—Naturalization and Aliens—Chinamen—Law of Canada—Legislative Power—Ultra Vires—British North America Act*,

PRIVY COUNCIL APPEALS—CANADA—*contd.*

1867 (30 & 31 *Vict. c.* 3), *s.* 91, *sub-s.* 25, *and s.* 92, *sub-ss.* 10, 13—*British Columbia* "*Coal Mines Regulation Act*, 1890" (53 *Vict. c.* 33), *s.* 4.

Held, that s. 4 of the British Columbian "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings, is in that respect ultra vires of the provincial legislature.

Regarded merely as a coal-working regulation, it would come within s. 92, sub-s. 10, or s. 92, sub-s. 13, of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by s. 91, sub-s. 25, in regard to "naturalization and aliens." UNION COLLIERY COMPANY OF BRITISH COLUMBIA *v.* BRYDEN - P. C. 580

9. —— *British Columbia—Statute—Construction—Permissive Statutory Powers—Injunction—Liability for Damages—Water—Irrigation—Land Slides.*

Wherever according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and the authority given is in the strict sense of law permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

Metropolitan Asylums District v. *Hill*, (1881) 6 App. Cas. 193, approved.

Where the effect of British Columbian legislation was to authorize the respondents to irrigate their soil by the compulsory diversion of water from any adjacent stream, lake, or river, by conveying it over lands which do not belong to them, and to run the surplus water after irrigation through adjacent lands by means of flumes, ditches, or drains, all subject to provisions for compensation, and the respondents brought water upon their land in such manner as to be the substantial cause of damage to the appellants' line of railway by causing a slide of their land:—

Held, reversing the judgment of the Court below, that, in the absence of provisions shewing an intention on the part of the Legislature to take away the appellants' right to protect their property from invasion, they were entitled to an injunction to prevent the respondents' user of the water in disregard of their common law obligation to do no damage to the appellants' land. CANADIAN PACIFIC RAILWAY COMPANY *v.* PARKE. P. C. 535

10. —— *Quebec — British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *sub-s.* 29, *and s.* 92, *sub-s.* 10—*Municipal Code of Quebec—Powers of Provincial Legislature — Municipal Legislation affecting Dominion Railway.*

By the true construction of British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works:—

PRIVY COUNCIL APPEALS—CANADA—*contd.*

But *held*, that the provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land, are intra vires of the provincial legislature. CANADIAN PACIFIC RAILWAY COMPANY *v.* NOTRE DAME DE BONSECOURS (PARISH OF) CORPORATION P. C. 367

11. —— *Quebec—Corporation—Property of—Liability to Taxation—Municipal Code of Quebec, Art.* 712, *sub-s.* 3—*Construction.*

By the true construction of art. 712, sub-s. 3, of the Municipal Code of Quebec, property belonging to a corporation "for the ends for which they are established, and not possessed solely by them to derive a revenue therefrom," is not taxable:—

But *held*, that a farm belonging to the appellant corporation and worked by them as a farm in order to derive revenue therefrom, is taxable, although not detached from the residue of the corporate property and occasionally used for the above ends. LE SÉMINAIRE DE QUÉBEC *v.* LA CORPORATION DE LIMOILOU - - P. C. 288

12. —— *Quebec — Trade Name — Right to Injunction—Colourable Imitation of Name—What constitutes False Representation.*

The appellant company, being the transferee of the assets and goodwill of the dissolved Sabiston Lithographic and Publishing Company, sued to restrain the respondent from carrying on business under the name of the Sabiston Lithographing and Publishing Company, or any other name so framed as to lead to the belief that his business was in succession to that of the dissolved company:—

Held, that the respondent had no right so to represent, but that there was no evidence that he had done so, and that the appellants were not entitled to an injunction against the mere use of the name. MONTREAL LITHOGRAPHING COMPANY *v.* SABISTON - - - P. C. 610

13. —— **CAPE OF GOOD HOPE**—*Act of State—Concessions granted before Cession—Rights after Annexation—Jurisdiction of Municipal Courts—Crown Liabilities Act*, 1888 (51 & 52 *Vict. No.* 37).

Held, that the appellants as grantees of concessions made by the paramount chief of Pondoland cannot, after the annexation of Pondoland by Her Majesty, enforce against the Crown the privileges and rights conferred.

Annexation is an act of State, and any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal courts are authorized to enforce.

The Crown Liabilities Act, 1888, permits such an action to be brought, but it does not empower the Court to make a declaration of right.

Secretary of State for India in Council v. *Kamachee Boye Sahaba*, (1859) 13 Moo. P. C. 22, followed. COOK *v.* SPRIGG - - P. C. 572

14. —— **GIBRALTAR**—*Criminal Jurisdiction and Procedure—Supreme Court at Gibraltar—Morocco Consular Court — Trial at Gibraltar should be by Jury.*

The Consular Court of Morocco and the

PRIVY COUNCIL APPEALS — GIBRALTAR — *continued.*

Supreme Court of Gibraltar having a concurrent jurisdiction in the matter of an offence charged against the appellant, he was arrested in London and ordered by the Queen's Bench Division to be tried before the Supreme Court at Gibraltar:—

Held, that as an incident to that order he was entitled to be tried according to the procedure of that Court, that is (see s. 38 of the Gibraltar Order in Council), by a jury. SPILSBURY *v.* THE QUEEN - - - - - **P. C. 392**

15. —— **NATAL**—*Dolus Malus*—*Priority of Unregistered Transfer*—*Registered Transfer set aside.*

In a suit against the executor dative of a deceased registered owner of lands in Natal and his transferee to set aside the transfer, it appeared that the plaintiff had taken a transfer from the owner in his lifetime, paid the purchase-money, and received the title-deeds, but had omitted to complete registration, though he had placed a resident agent in possession and management. It also appeared that the defendants had obtained orders from the Court for delivery of certified copies of such title-deeds as having been lost, and for sale by the executor dative by private contract, concealing the fact that the occupier of the lands held under an alleged lawful possession which might possibly be accompanied by possession of the title-deeds, and thereafter effected and registered their transfer:—

Held, that this constituted dolus malus within the meaning of Roman-Dutch law; that the said transfer must be set aside; and that the plaintiff had a locus standi to maintain the suit. CROWLY *v.* BERGTHEIL - - **P. C. 374**

16. —— *Practice*—*Appeal*—*Right of*—*Licensing Officer* — *Jurisdiction of Supreme Court* — *Law* 18 *of* 1897 (60 *&* 61 *Vict.*), *ss.* 5 *and* 6—*Construction.*

Under Natal Law 18 of 1897, ss. 5 and 6, an appeal lies to the town council alone from a decision of its licensing officer.

No appeal lies from the decision of the town council. A summons for a writ of review thereof by the Supreme Court issued under Law 39 of 1896, s. 8, cannot in appeal be treated as for a writ of certiorari contrary to the plain intention of the parties and of the Court below. VAUDA *v.* NEWCASTLE CORPORATION - - **P. C. 246**

17. —— **NEW SOUTH WALES**—*Company*—*Contract*—*Effect of Company's Adoption of Contract made before its formation*—*Payment of Shares in Cash*—*Set-off*—*New South Wales Companies Act*, 1874 (37 *Vict. No.* 19), *s.* 57—*Imperial Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.

A company does not by its adoption of a contract of purchase made before its formation by persons purporting to act on its behalf incur any contractual relation with or obligation to the vendor.

In re Johannesburg Hotel Co., [1891] 1 Ch. 119, approved.

But where a company on completion of conveyances to it by the vendor gave credit to him for moneys placed in his hands as promoter on the terms of the company's prospectus by intending shareholders and specifically appropriated by them in payment pro tanto for their shares, registered the shares in their names, and at the same time obtained credit in respect of the payment from the vendor on account of the purchase-money:—

Held, that this was a payment in cash to the company in respect of those shares within the meaning of s. 57 of the New South Wales Companies Act, 1874, which is substantially identical with s. 25 of the Imperial Companies Act, 1867. NORTH SYDNEY INVESTMENT AND TRAMWAYS COMPANY *v.* HIGGINS - - **P. C. 263**

18. —— *Crown Lands Act*, 1884 (48 *Vict. No.* 18), *s.* 102; 1895 (58 *&* 59 *Vict. No.* 18), *ss.* 10, 11, 13—*Application for Additional Conditional Purchase*—*Respondent barred under one Act, in Time under the other.*

Under the Crown Lands Act, 1884, the land in suit had was reserved for a public purpose by notification on July 4, 1896.

On January 9, 1897, the notification was revoked, and it was notified in the *Gazette* of that day that it was set apart for homestead selections under ss. 10 and 13 of the Crown Lands Act of 1895:—

Held, that the respondent's application on February 11, 1897, to take the land as an additional conditional purchase, though within the forty days of grace prescribed by s. 11 of the later Act, was nevertheless barred as having been made before the expiry of the sixty days' delay prescribed by s. 102 of the Act of 1884.

Colless v. *Minister of Lands*, [1899] A. C. 90, followed. MINISTER FOR LANDS *v.* HARRINGTON **P. C. 408**

19. —— *Crown Lands Acts*—*Resumed Area*—*Leasehold Area*—*Crown Lands Act*, 1895 (58 *&* 59 *Vict. No.* 18), *ss.* 5, 11.

Under s. 5 of the Crown Lands Act, 1895, leasehold area becomes resumed area after notification to that effect in the *Gazette*. A grant to a tenant on the expiry of his lease of a preferential occupation licence in regard to his holding does not under the Crown Lands Acts change its character to that of a resumed area. Nor does a *Gazette* announcement of such licence operate as a notice that the area affected has been resumed:—

Held, accordingly, that the appellant had no title to apply before notification under s. 5 for a conditional lease of land held under a licence; and that s. 11 of the same Act (which only saves existing rights) did not avail him. COLLESS *v.* MINISTER FOR LANDS - - - **P. C. 90**

20. —— *Guarantee* — *Bond* — *Construction*—*Recital and Condition.*

The respondent with others gave a joint and several guarantee to the appellant bank limited to 2500*l.* in respect of overdrafts by a customer. Subsequently he with others gave a joint and several bond reciting a desire for advances to the same customer over and above that amount, and securing repayment of the balance of account current.

In an action brought both on the guarantee and bond, the former was held to be invalid; but

Held, that the condition of the bond, being

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

plainly to secure repayment of all moneys advanced by the bank and not merely those in excess of the said 2500*l.*, could not be controlled by any recital not plainly inconsistent therewith. AUSTRALIAN JOINT STOCK BANK *v.* BAILEY P. C. 396

21. —— *Income Tax—Taxable Income—Mortgages—Land and Income Tax Assessment Act*, 1895 (59 *Vict. No.* 15), *ss.* 27, 28, *sub-s.* 1—*Construction.*

Under the New South Wales Land and Income Tax Assessment Act, 1895, s. 27, the taxable amount of the respondent's income was limited to the amount of its income derived from mortgages; under s. 28, sub-s. 1, certain expenses incurred by the taxpayer "in the production of his income" were to be deducted:—

Held, that by the true construction of the subsection the respondent was entitled to deduct all expenses incurred in the production, not merely of its mortgage income, but of its income as a whole. COMMISSIONERS OF TAXATION *v.* TEECE. P. C. 254

22. —— *Limitations, Statute of—Equitable Jurisdiction — Underground trespass — Fraud — Laches—Champerty.*

Although courts of equity are not within the words of the Statute of Limitations, yet they are within its spirit and meaning, and have uniformly adopted its rules.

Where the appellants had furtively for a series of years taken the respondents' coal by means of a wilful and secret underground trespass: and no laches was attributable to the respondents in not discovering the existence of the wrongful workings by the appellants:—

Held, on a summons issued by the latter in the winding-up of the appellant company, that they were entitled to recover from the appellants the market value of all the coal worked and gotten by them from the respondents' land, no allowance being made for the cost of working.

To such a claim the Statute of Limitations has no application. So long as there has been no laches by the party defrauded, it is immaterial whether or not there have been on the part of the wrongdoer active measures to prevent detection:—

Held, that an agreement between the respondents and their lessees (under a lease executed before discovery of the trespass) by which the former were indemnified against costs of suit on terms of paying to their lessees 92½ per cent. of the amount recovered was not champertous.

Ecclesiastical Commissioners for England v. *North Eastern Ry. Co.*, (1877) 4 Ch. D. 845, disapproved. BULLI COAL MINING COMPANY *v.* OSBORNE. P. C. 351

23. —— *Practice—Appeal from Interim Injunction—Trespass—New South Wales Mining on Private Lands Act*, 1894 (57 *Vict. No.* 32), *ss.* 8, 13—*Gold Lease Application.*

Appeals from interlocutory injunctions, of an essentially temporary kind, will not be encouraged.

Where an interim injunction had been granted restraining the appellant from trespassing or mining upon land covered by the private gold lease application of the respondent, who under s. 8 of the New South Wales Mining on Private Lands Act, 1894, had obtained a miner's right and authority, and under s. 13 had made application not yet granted at date of suit for a twenty years' lease:—

Held, that the respondent, having a definite statutory right to apply for a lease, had a locus standi to apply for an injunction which should be maintained till discharged by the Court. CROUDACE *v.* ZOBEL P. C. 258

24. —— *Probate Duty paid under Protest—Application for Refund—Delay—Stamp Duties Acts of* 1880 (44 *Vict. No.* 3) *and* 1886 (50 *Vict. No.* 10).

Where executors paid probate duty partly under mistake of law and partly with a reservation of their right to have the excess refunded without regard to delay, and it was subsequently decided in another case that no duty at all was payable as claimed:—

Held, that an application made nine years later for a mandamus to state a case for the Full Court was not brought within a reasonable time, and must be refused. BROUGHTON *v.* COMMISSIONER OF STAMP DUTIES. P. C. 251

25. —— **NEW ZEALAND**—*Charitable Trusts—Exemption from Duty—Charitable Gifts Duties Exemption Act*, 1883 (46 & 47 *Vict. No.* 46), *ss.* 2, 3—*Land and Income Assessment Act*, 1891 (54 & 55 *Vict. No.* 18), *s.* 16, *sub-s.* 1—*Amendment Act*, 1892 (55 & 56 *Vict. No.* 54), *s.* 3, *sub-s.* 4—*Construction.*

Held, that a gift by will, for the maintenance and education of boys who are orphans or the sons of parents in straitened circumstances, is "charitable" within the meaning of the New Zealand Exemption Act, 1883, s. 3; notwithstanding that the educational institute to be formed is directed to be managed by the members, and its inmates to be instructed in the tenets, of a particular religious sect:

Held, also, that the institute, being an educational endowment in perpetuity vested in trustees without personal interest therein, the whole beneficial interest belonging exclusively and inalienably to the public, is a public institution within the meaning of s. 2:

Held, further, that the income derivable under the gift is exempt from taxation by s. 16, subs. 1, of the Land and Income Assessment Act, 1891, and by s. 3 of the amending Act of 1893 read therewith. DILWORTH *v.* COMMISSIONER OF STAMPS. DILWORTH *v.* COMMISSIONER FOR LAND AND INCOME TAX P. C. 99

26. —— **NEWFOUNDLAND** — *Banker and Customer — Effect of Drawee Bank certifying Cheque—Usage—Effect of crediting Customer with Amount of Cheque deposited.*

Unless a specific usage is proved, the only effect of a drawee bank initialling a cheque drawn upon it is to certify that it has funds of the drawer in its hands sufficient to meet its payment:—

Held, that the respondent bank, by accepting a deposit of a certified cheque and crediting the

PRIVY COUNCIL APPEALS — NEWFOUNDLAND—*continued.*

depositor with the amount thereof in her account, must be deemed to have accepted it for the purpose of cashing it as the depositor's agent, and could not, in the absence of express agreement to that effect, be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank. GADEN *v.* NEWFOUNDLAND SAVINGS BANK - - - - P. C. 281

27. —— **TRINIDAD AND TOBAGO**—*Support—Adjacent Lands—Right to Lateral Support—Escape of Pitch—Injunction—Damages.*

Where the defendants by removing the lateral support of their land caused the asphalt or pitch which formed the main ingredient of the plaintiffs' land to melt and ooze forth into their own land and thereupon appropriated it to their own use :—

Held, that an injunction was rightly granted by the first Court to restrain them, and that damages were recoverable both for injury caused by subsidence of the plaintiffs' surface and for loss of the pitch. TRINIDAD ASPHALT COMPANY *v.* AMBARD - - - - P. C. 594

PROBATE—*Legatee preparing Will in his own Favour—Findings of Jury—Motion for New Trial—Practice.*

On a motion for a new trial made by the executors after the Court had excluded from probate a pecuniary legacy exhausting nearly the whole of the testator's estate to his confidential agent who had drawn the will, it appeared that the jury had properly found that the testator knew and approved its contents except as regards the above bequest, which he did not know and approve of, but had in a rider expressed its belief that the testator intended to give to said legatee half his property :—

Held, that the motion was properly refused. The rider did not neutralise but rather supported the verdict, for, if correct, it shewed that the will did not truly express the testator's intention. FARRELLY *v.* CORRIGAN - - P. C. 563

PROBATE DUTY — Testator foreign subject domiciled abroad—Executor de son tort—Liability to pay probate duty - 62
See REVENUE. 3.

PROLONGATION — Petition for — Novelty consisting in the combination—Absence of unusual merit - - - 415
See PATENT.

PROTEST—Probate duty paid under—Application for refund—Delay - - 251
See PRIVY COUNCIL APPEALS. 24.

PUBLIC HEALTH (SCOTLAND)—Rates—Ultra vires—Costs of opposing bill in Parliament - - - - - 508
See SCOTTISH LAW. 1.

PUBLIC-HOUSE—Lease—Covenant, construction of—"Discontinuance" of licence 442
See LANDLORD AND TENANT.

QUEBEC—Laws of - - 288, 367, 610
See PRIVY COUNCIL APPEALS. 10—12.

QUEENSLAND — Probate — Legatee preparing will in his own favour — Findings of jury—Motion for new trial - 563
See PROBATE.

RACECOURSE — Inclosure on — Place used for betting - - - - 143
See GAMING.

RAILWAY—*Charge for use of Sidings—Arbitration—Jurisdiction—Condition Precedent—Difference before Action brought.*

A Railway Act confirming a Provisional Order, after empowering the railway company to charge a reasonable sum for certain services rendered to a trader, by way of addition to the tonnage rate, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The company having sued the respondents for services under this section, the respondents objected to the jurisdiction of the Court on the ground that the matter was one for the arbitrator to determine :—

Held, that as there had been no difference existing between the parties before action brought the arbitrator had not and the Court had jurisdiction.

The decision of the Court of Appeal, [1898] 2 Q. B. 7, reversed and the decision of Wright and Darling JJ. restored upon the above ground.

Query, whether the arbitrator can determine any matter except the reasonableness of the charges. LONDON AND NORTH WESTERN AND GREAT WESTERN JOINT RAILWAY COMPANIES *v.* J. H. BILLINGTON, LIMITED - H. L. (E.) 79

2. —— *Charge for Use of Sidings—Reasonableness of Charges — Time allowed for taking Delivery—Jurisdiction of Arbitrator—Regulation—Provisional Order.*

A Railway Act confirming a Provisional Order, after empowering the railway company to charge for certain services rendered to a trader a reasonable sum by way of addition to the tonnage rate, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The services included "The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof . . . . And services rendered in connection with such use and occupation" :—

Held, that the arbitrator had jurisdiction to determine not only the reasonableness of the sums charged for the accommodation, but all questions necessarily incidental thereto, and among them the reasonableness of the time allowed to the consignee for taking delivery of the merchandise.

London and North Western Ry. Co. v. *Donellan*, [1898] 2 Q. B. 7, approved. MIDLAND RAILWAY COMPANY *v.* LOSEBY & CARNLEY H. L. (E.) 133

—— Canada Railway Act—Construction—Railway Committee of Privy Council 275
See PRIVY COUNCIL APPEALS. 4.

RAILWAY—*continued.*

— Municipal legislation affecting Dominion railway—Municipal Code of Quebec *See* PRIVY COUNCIL APPEALS. 10. **367**

RATES—*Market Garden—Glass-houses—"Agricultural Land"—Rating—Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 5, 6, 9.

Glass-houses in or on a market garden, if buildings, must under the Agricultural Rates Act, 1896, be rated as buildings and not as agricultural land.

The decision of the Court of Appeal, [1898] 1 Q. B. 683, affirmed. SMITH *v.* RICHMOND **H. L. (E.) 448**

—— Costs of opposing bill in Parliament—Ultra vires—Burgh - - - **508** *See* SCOTTISH LAW. 1.

REASONABLENESS—Charge for use of sidings—Time allowed for taking delivery—Jurisdiction of arbitrator - - **133** *See* RAILWAY. 2.

RECITAL—Condition and—Guarantee—Bond—Construction - - - **396** *See* PRIVY COUNCIL APPEALS. 20.

REDEMPTION—Equity of—Estate duty—Mortgage of settled property—Annuity **198** *See* REVENUE. 2.

REFUND—Application for—Delay—Probate duty paid under protest - - **251** *See* PRIVY COUNCIL APPEALS. 24.

REGISTRATION—Dolus malus—Priority of unregistered transfer—Registered transfer set aside—Laws of Natal - - **374** *See* PRIVY COUNCIL APPEALS. 15.

—— Expunging—Non-user and no bonâ fide intention to use - - - **428** *See* TRADE-MARK.

RELEVANCY—Will—Capacity—Insane delusions - - - - - - **1** *See* WILL.

REMAINDERMAN—Surrender of life interest to—Estate duty - - - **53** *See* REVENUE. 1.

REMOVAL—"Off licence"—Order sanctioning removal—Notice of application for new licence - - - - **222** *See* LICENSING ACTS.

REVENUE—*Estate Duty—Settled Property—Property passing on Death—Interest ceasing on Death—Surrender of Life Interest to Remainderman—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1, *s.* 2 *sub-s.* 1 (*b*).

The tenant for life of settled property with a power of appointment appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest to the trustees of the settlement "to the end and intent that such life interest may merge in the interest in remainder of" her son; and died more than twelve months after:—

Held, affirming the decision of the Court of Appeal, [1898] 2 Q. B. 147, that the property did not pass on the death of the tenant for life to the remainderman within the meaning of the Finance Act, 1894, s. 1, or s. 2, sub s. 1 (*b*), and that estate duty was not payable by the remainderman under that Act. ATTORNEY-GENERAL *v.* BEECH **H. L. (E.) 53**

2. —— *Estate Duty—Tenant for Life and Tenant in Tail—Mortgage of Settled Property—Equity of Redemption—Annuity—Value of Property passing on Death of Tenant for Life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 5.

Father and son, tenant for life and tenant in tail respectively, executed a disentailing deed by which they granted the estates to a trustee to hold freed from the estate tail to such uses as they should jointly appoint. In exercise of that power father and son mortgaged the estates in fee simple to a company as security for a loan, part of which was advanced for the benefit of the father and part for the benefit of the son. With part of the loan prior incumbrances on the father's life estate were paid off, and the company took an assignment of the debts and all the assignors' rights and powers of recovery as further security for the loan. Father and son then executed a deed of resettlement by which the estates were charged with an annuity to the son payable during the father's life, and subject thereto were declared to be held in trust for the father for life and after his death for the son for life with remainders over. Upon the father's death in 1895 the Crown claimed from the son under the Finance Act, 1894, estate duty upon the gross value of the estates without allowing any deduction in respect either of the mortgage to the company or of the annuity which ceased with the father's life:—

Held, reversing on this point the decision of the Court of Appeal (*In re Earl Cowley's Estate*, [1898] 1 Q. B. 355), that the case fell under s. 1 of the Finance Act, 1894, that the settled property which passed to the son on the father's death was only the equity of redemption, and that estate duty was therefore payable only on the equity of redemption.

Held also, affirming the decision of the Court of Appeal on this point, that no deduction was allowable in respect of the annuity.

The decision of Pollock B. and Bruce J., [1897] 2 Q. B. 47, restored. EARL COWLEY *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 198**

3. —— *Probate Duty—Testator Foreign Subject domiciled Abroad—Company—Executor de son Tort—Intermeddling with Estate—Liability to pay Probate Duty—Penalties*—55 *Geo.* 3, *c.* 184, *s.* 37—*Crown Suits Act*, 1865 (28 & 29 *Vict. c.* 104), *s.* 57—*Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 40.

Upon the death of a testator, a foreign subject domiciled in America, shares and debentures in an English company, of which he was the registered holder in the books of the company in London, passed by his will to his executors in America, according to the law of his domicil. At their request the company paid to them the dividends and interest payable upon the testator's shares and debentures and transferred into their names in the company's books in London two shares and a debenture. The executors to the

REVENUE—*continued.*
knowledge of the company had not obtained and did not intend to obtain probate in England:—

Held, that the company had made themselves executors de son tort; that they had "taken possession of and administered" part of the testator's estate (see 55 Geo. 3, c. 184, s. 37; 28 & 29 Vict. c. 104, s. 57) and were liable to penalties, and to deliver an account and pay such duty as would have been payable if probate had been obtained in England.

The decision of the Court of Appeal, [1898] 1 Q. B. 205, affirmed.

Semble by Lord Davey that the company were persons who "ought to obtain probate or letters of administration" in England within the meaning of the Customs Act, 1881 (44 Vict. c. 12), s. 40 (although they were not entitled to do so), because under the Probate Act, 1857, s. 73, the Court had power in its discretion to appoint them administrators. NEW YORK BREWERIES COMPANY *v.* ATTORNEY-GENERAL - - H. L. (E.) 62

—— Charitable trust—Exemption from duty—Laws of New Zealand - - 99
See PRIVY COUNCIL APPEALS. 25.

—— Income tax—Taxable income—Mortgages—Laws of New South Wales - 254
See PRIVY COUNCIL APPEALS. 21.

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SCOTTISH LAW—*Costs of opposing Bill in Parliament—Burgh — Public Health (Scotland) Act*, 1867 (30 & 31 *Vict. c.* 101), *s.* 95—*Rates—Ultra Vires.*

The magistrates and council of Leith, who were also the local authority for public health, incurred costs in opposing in Parliament a bill for amalgamating the burghal territory of Leith and Portobello with an enlarged district subject to the government of the new and extended corporation of the city of Edinburgh, and they succeeded in having the bill thrown out as regards Leith:—

Held, affirming the decision of the Second Division of the Court of Session, (1897) 25 R. 126, that it was ultra vires of the magistrates to include the expenses of the opposition in the public health assessment as expenses "incurred in executing" that Act.

Attorney-General v. *Mayor of Brecon*, (1878) 10 Ch. D. 204, distinguished. LEITH COUNCIL *v.* LEITH HARBOUR AND DOCKS COMMISSIONERS H. L. (Sc.) 508

SCOTTISH LAW—*continued.*

2. —— *Succession—Vesting—Postponed Period of Distribution—Conditional Institution.*

A testator directed his trustees to allow his widow the life-rent use of his house and such allowance as they thought necessary, and "on the dissolution and winding-up of the firm of B. & Co." (of which he was a partner), "in the event of the predecease of my said wife, and if she then survives, on her death, to realize my whole means and estate and to divide the same into four equal shares, and pay one share to each of my children" A., B., C., and D., "or to their respective heirs." The widow survived the testator, and the firm had not been wound up. C. and D. survived the testator, but were dead:—

Held, affirming the decision of the First Division of the Court of Session, (1898) 25 R. 811, but not on the same reasoning, that the interests of all the children were not in suspense, but had vested a morte testatoris. BOWMAN *v.* BOWMAN H. L. (Sc.) 518

3. —— *Succession—Will—Provision for Widow—Partial Intestacy—Terce, Jus Relictæ, and Legitim.*

A testator by his will made a provision for his wife declaring it to be in full of all claims by her of terce and jus relictæ or otherwise. Through the death of certain devisees before vesting took place, the residue fell into intestacy:—

Held, affirming the decision of the First Division of the Court of Session, (1898) 25 R. 899, that the declaration was to be construed as excluding the widow's claim in so far only as conflicting with the will, and, an event happening which the testator never contemplated, the widow was entitled both to her provision and to terce and jus relictæ out of such heritables and movables as had fallen into intestacy. NAISMITH *v.* BOYES H. L. (Sc.) 495

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See RAILWAY. 2. 133

TOLLS—*Prescriptive Right—Extinguishment of old Franchise by Statute.*

A municipal corporation having a prescriptive right to take certain customary tolls for the passage of carriages, cattle, &c., over a bridge belonging to them, obtained in 1734 a local Act which, after reciting their right to take the customary tolls, enacted that the said customary tolls should be and remain vested in them, and empowered them to take the said tolls, with a variation as to the exemption of freemen of the borough. In 1819 the corporation obtained another local Act which repealed the former Act and empowered them to take down the old bridge and build a new one and to take tolls which varied from the old tolls in amount and subject-matter. This Act was temporary and had expired:—

Held, that the prescriptive right to take tolls had been merged in and extinguished by the statutory right given in 1734, and neither had nor could have been revived by the later Act, and that the right to take tolls expired with the later Act.

The decision of the Court of Appeal, [1898] 1 Q. B. 186, affirmed. NEW WINDSOR CORPORATION *v.* TAYLOR - - H. L. (E.) 41

TRADE-MARK—*Registration—Non-user and no bonâ fide Intention to use—Expunging.*

A trader is not entitled to register a trade-mark for goods in which he does not deal and in which he has no bonâ fide intention of dealing. Registration under such circumstances may be expunged.

The decision of the Court of Appeal, *In re John Batt & Co.'s Registered Trade-marks*, [1898] 2 Ch. 432, affirmed. JOHN BATT & CO. *v.* DUNNETT H. L. (E) 428

TRADE NAME—*Company—Similarity of Name—Deception.*

The Manchester Brewery Company, Limited, had carried on business under that name for years. The appellants bought an old business called "The North Cheshire Brewery Company, Limited," and then (without intending to deceive) got themselves incorporated and registered under the name, "The North Cheshire and Manchester Brewery Company, Limited":—

Held upon the evidence that as a matter of fact the name of the appellant company was calculated to deceive and that the appellants must therefore be restrained by injunction in the usual way.

The decision of the Court of Appeal, [1898] 1 Ch. 539, affirmed. NORTH CHESHIRE AND MANCHESTER BREWERY COMPANY *v.* MANCHESTER BREWERY COMPANY - - H. L. (E.) 83

2. —— *Descriptive Name—Interdict.*

The appellants, an English company, wholesale dealers in cloth of a particular texture which they sold under the name of "cellular cloth," sought to restrain the respondents, a Scottish firm, from using the name "cellular" in such a way as to pass off goods not of the appellants' manufacture as and for the goods of the appellants, or as goods advertised by them. The appellants claimed to have invented, or at least to have put upon the market, a fabric suitable for shirting and underwear woven in a particular manner; and alleged that they had for the last ten years described this fabric in their advertisements as made in a certain way; and that they had marked it and invoiced it under the name of "cellular cloth" largely in England and, to some extent, in Scotland. The name had not been registered. The respondents were a wholesale firm in Edinburgh who sold cotton and woollen goods; and it was proved that they were not aware until lately of the appellants' manufacture:—

Held, affirming the decision of the First

TRADE NAME—*continued.*
Division of the Court of Session, that the appellants were not entitled to an interdict on the grounds—(1.) that the word "cellular" was a descriptive word, namely, an ordinary English word which appropriately and conveniently described the cloth of which the goods sold by the respondents were manufactured; and (2.) that the term had not been proved by the appellants to have acquired a secondary meaning attaching it to the particular kind of goods sold by them.
Reddaway v. *Banham*, [1896] A. C. 199, distinguished. CELLULAR CLOTHING COMPANY *v.* MAXTON & MURRAY - - H. L. (Sc.) 326

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—— Succession—Postponed period of distribution—Conditional institution - 518
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WATER — Irrigation — Land slides—Injunction—Liability for damages - - 535
See PRIVY COUNCIL APPEALS. 9.

WILL—*Relevancy—Capacity—Insane Delusions.*
In an action for reduction of a will the pursuers averred that the testator was "subject to insane delusions," and that "he believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communications on various occasions." That these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will:—
Held, reversing the decision of the First Division of the Court of Session, (1896) 23 R. 513 (Lord Davey dissenting), that a relevant case for trial was averred. HOPE *v.* CAMPBELL
H. L. (Sc.) 1

2. —— *Succession—Vesting—Issue.*
A testator bequeathed to his three daughters, in equal shares, the life-rent of a sum of 36,000*l.*, to be invested within five years after his decease. Until the investment was made, he bequeathed to each daughter an annuity of 200*l.* In the event of a daughter dying, without leaving issue, her life-rent interest was to accresce to her surviving sister or sisters, whilst the capital of the share life-rented by her lapsed into residue. In the event of her leaving issue, the trustees were directed "to divide equally amongst the issue of each of my said daughters" one-third of the sum directed to be invested. Mrs. M., one of the daughters, died in March, 1895, leaving surviving two daughters. Mrs. M. had had also a son and a daughter, Mrs. H., who predeceased her childless, but died after the testator. The question was whether the representatives of the predeceasing issue were entitled to a share of the capital appointed to be divided amongst Mrs. M.'s issue:—
Held, reversing the decision of the Second Division, (1896) 23 R. 598 (Lords Watson and Herschell dissenting), that all the children of Mrs. M. were entitled to share equally in the division of the fund in which their mother had a life interest. HICKLING *v.* FAIR H. L. (Sc.) 15

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